Petition

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No. 81-____

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In The

Supreme Court of the United States

October Term, 1981

CROW TRIBE OF INDIANS,

Respondents,

vs.

THE STATE OF MONTANA, and
RAMON DORE, Director
Montana Department of Revenue,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Commonwealth Edison Co. v. Montana*, 101 S. Ct. 2946, — U. S. — (1981), controls this case, or whether that decision is rendered inapplicable because non-Indian coal producers mine coal beneficially owned by the Crow Tribe.

2. Whether the general policy of the 1938 Indian Mineral Leasing Act, 25 U. S. C. Sections 396a-396g, prohibits the State of Montana from collecting its otherwise valid coal severance tax and gross proceeds from coal tax from non-Indian coal producers mining coal beneficially owned by the Crow Tribe.

3. Whether the State of Montana has the right to impose its coal severance tax and gross proceeds from coal tax, both general revenue taxes, upon non-Indians producing coal which is beneficially owned by the Crow Tribe, regardless of the economic effect on the Crow Tribe and regardless of the location of the coal on or off of the Crow Indian Reservation.

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Montana Department of Revenue,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, State of Montana and the Director of the Montana Department of Revenue, (hereinafter called the "State"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 13, 1981, and modified on January 5, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 650 F. 2d 1104 (1981), and the subsequent modifying Order is reported at 665 F. 2d 1390 (1982). They appear in the Appendix hereto. The opinion of the United States District Court for the District of Montana, 469 F. Supp. 154 (D. Mont. 1979) also appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 13, 1981. A timely petition for rehearing *en banc* was denied on January 5, 1982, and this petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether this Court's decision in *Commonwealth Edison Co. v. Montana*, 101 S. Ct. 2946, — U. S. — (1981), controls this case, or whether that decision is rendered inapplicable because non-Indian coal producers mine coal beneficially owned by the Crow Tribe.

2. Whether the general policy of the 1938 Indian Mineral Leasing Act, 25 U. S. C. Sections 396a-396g, prohibits the State of Montana from collecting its otherwise

valid coal severance tax and gross proceeds from coal tax from non-Indian coal producers mining coal beneficially owned by the Crow Tribe.

3. Whether the State of Montana has the right to impose its coal severance tax and gross proceeds from coal tax, both general revenue taxes, upon non-Indians producing coal which is beneficially owned by the Crow Tribe, regardless of the economic effect on the Crow Tribe and regardless of the location of the coal on or off of the Crow Indian Reservation.

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

Statutes and constitutional provisions involved are:

(1) The Enabling Act of Montana, February 22, 1889, 25 Stat. 676, which in pertinent part provides:

> An Act * * * to enable the people of * * * Montana * * * to be admitted into the Union on an equal footing with the original states * * *. §4. * * * Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, * * *.

(2) Montana Constitution, Ordinance No. I (1889) which states in pertinent part:

> Second. That the people inhabiting the said proposed state of Montana, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within the said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States, * * *.

(3) Montana Constitution, Art. IX, Section 5 (1972) which states in pertinent part:

> The legislature shall dedicate not less than one-fourth (¼) of the coal severance tax to a trust fund, the interest and income from which may be appropriated. The principal of the trust shall forever remain inviolate unless appropriated by vote of three-fourths (¾) of the members of each house of the legislature. After December 31, 1979, at least fifty percent (50%) of the severance tax shall be dedicated to the trust fund.

The following treaties, statutes and regulations are reproduced in the Appendix hereto:

Montana Gross Proceeds Tax, Montana Codes Annotated §§ 15-23-701—15-23-704

Montana Coal Severance Tax, Montana Codes Annotated §§ 15-35-101—15-35-111

Mineral Leasing Act of May 11, 1938, 52 Stat. 347 [codified, as amended, at 25 U. S. C. A. §§ 396a-396g (1976)]

25 C. F. R. §§ 171.1 - .30 (1980)

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General Allotment Act of Feb. 8, 1887, 24 Stat. 388

Act of May 26, 1926, 44 Stat. 658 (in pertinent parts)

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Act of May 19, 1958, 72 Stat. 121

Treaty of Fort Laramie of 1851, 11 Stat. 749

Second Treaty of Fort Laramie of 1868, 15 Stat. 649

Act of April 27, 1904, 33 Stat. 352 (Crow Cession Act)

STATEMENT OF THE CASE

This case involves the question of whether non-Indian coal producers are exempt from payment of Montana's coal severance tax and gross proceeds from coal tax because they mine coal beneficially owned by the Crow Tribe of Indians.

The Crow Tribe of Indians is the beneficial owners of large deposits of coal lying beneath the Crow Indian Reservation, Montana, and beneath an area called the "ceded strip." The ceded strip consists of approximately 1,137,500 acres which were originally part of the Crow Indian Reservation. The Crow Tribe ceded all of its interest in the

area to the United States in 1904 in order to open the area to non-Indian entry and settlement pursuant to the Act of April 27, 1904, ch. 1624, 33 Stat. 352. The surface interests are now held predominantly by non-Indians. Much of the mineral interest, however, was retained by the United States. Some of the mineral estate was conveyed back to the Tribe in 1958.[1]

The ceded strip is not part of the Reservation proper. *Little Light v. Crist*, 649 F. 2d 682, 685 and 690 (9th Cir. 1981). The Crow Tribe provides absolutely no governmental services to the area and has no responsibilities to provide such services. The ceded strip is solely the governmental responsibility of the State of Montana which, together with the local governments, provides all governmental services to the ceded strip.

In 1975, the State of Montana enacted statutes which imposed on coal mine operators a severance tax on each ton of coal produced in the State and a gross proceeds from coal tax on the sale of each ton of coal produced in the State. Sections 15-35-101 through 15-35-111 and Sections 15-23-701 through 15-23-704, Montana Code Annotated [hereinafter MCA].[2]

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[1]Montana acknowledges that at least some of the mineral estate on the ceded strip is held by the United States in trust for the Crow Tribe. If a trial is required in this case, the State of Montana will contend that the Crow Tribe of Indians is the equitable owner of less than 15 percent of the mineral estate of the ceded strip, and that portions of the mineral estate held by the United States are in fact not held in trust for the Crow Tribe, but for the Nation as a whole.

[2]The Montana Coal Severance Tax is familiar to this Court as the subject of *Commonwealth Edison Co. v. Montana*, 101 S. Ct. 2946, — U. S. — (1981).

The Montana Coal severance tax is "imposed on each ton of coal produced in the State. . . ." Section 15-35-103, MCA. "Produced" means "severed from the earth." Section 15-35-101, MCA. The tax is measured by the value or "contract sales price" of the coal which is defined as "the price of coal extracted and prepared for shipment f. o. b. mine, excluding that amount charged by the seller to pay taxes paid on production. . . ." Section 15-35-102, MCA. Taxes paid on production are defined in Section 15-35-102 (6), MCA. The rate of the tax varies from three to thirty percent of the value of the coal, depending on the heat and quality of the coal and nature of the mine, (surface or underground mining). The severance tax is to be paid quarterly directly to the Department of Revenue by each coal mine operator. Section 15-35-104, MCA.

The gross proceeds from coal tax is imposed on "each person engaged in mining coal." Section 15-23-701, MCA. Each person mining coal must file with the Department of Revenue an annual report which must include a statement of the "tons of coal extracted, treated or sold from the mine during the taxable period" and "the gross yield or value in dollars and cents derived from the contract sales price." Section 15-23-701, MCA. The Department of Revenue transmits to the County Assessor of each county in which the coal mines are located the valuation of the gross proceeds of the mine. The County Assessor then enters the value on an assessment roll, Section 15-23-702, MCA, and transmits a tax assessment to the County Treasurer who proceeds to collect the taxes due from the coal mine operator. Section 15-23-703, MCA.

In 1972, three years before the enactment of the severance tax and gross proceeds from coal tax, the Crow

Tribe leased approximately 31,000 acres of its coal lands within the ceded strip to Westmoreland Resources, a non-Indian mining company. Although the Tribe has granted processing permits to and entered into leases with other non-Indian companies for on-reservation mining, only Westmoreland has mined coal beneficially owned by the Crow Tribe.

Westmoreland Resources has paid the coal severance tax and gross proceeds from coal tax since 1975. Because of the quality of the coal, the severance tax is thirty percent of the value of the coal mined, less other taxes paid on production. Up to the time of the Ninth Circuit opinion in this case, Westmoreland had paid approximately $27,000,000 in severance tax and $3,000,000 in gross proceeds tax. Pursuant to the two leases of Westmoreland with the Crow Tribe, Westmoreland had paid approximately $8,000,000 in royalties to the Tribe.

The Crow Tribe has never paid any coal severance tax or gross proceeds from coal tax to the State of Montana, and neither its property nor its royalty has ever been taxed. The Tribe enacted its own coal tax code on January 31, 1976, providing for a severance tax of twenty-five percent of the value of coal mined by the Tribe's lessees. The Secretary of the Interior approved the tax for on-reservation mining only, but not for the mining occurring on the ceded strip. The Tribe has not enacted a gross proceeds from coal tax.

In 1978, the Crow Tribe sought injunctive and declaratory relief against the imposition of the taxes on the non-Indian mining lessees. The District Court had jurisdiction under 28 U. S. C., Sections 1331, 1343 and 1362. The complaint alleged various theories, including that the taxes

illegally fell upon Crow tribal property, and that the taxes were void under the Mineral Leasing Act of 1938, as amended, 25 U. S. C., Sections 396a-396f (1970), the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, and Section 4 of the Montana Enabling Act of February 22, 1889, 25 Stat. 676; that the taxes reduced the ability of the Tribe to realize the full benefit of its resources, threatened the Tribe's ability to impose its own tax, and infringed on the right of the Tribe to govern itself and its people and to provide governmental services to them.

The State of Montana moved to dismiss the complaint for failure to state a claim upon which relief may be granted. The District Court dismissed the complaint under Fed. R. Civ. P. 12(b) (6), holding that the taxes did not fall upon the Tribe, tribal trust lands, or the income of tribal members but instead fell upon Westmoreland Resources, and therefore did not require congressional authorization and did not violate the Enabling Act. The District Court further held that the economic effect of the taxes, if any, upon the Tribe was not an interference with tribal self government and that the State taxes were not preempted by the tribal tax.

The Tribe appealed the District Court decision.[3] The Ninth Circuit Court of Appeals remanded the case for trial, even though it held that the incidence of the taxes falls upon non-Indian lessees.

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[3]The District Court also dismissed the claims of individual plaintiffs, and dismissed the second amended complaint against the county treasurers and assessors named as defendants. These rulings were not appealed by the Crow Tribe.

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with the decisions of this Court in Commonwealth Edison Co. v. Montana, 101 S. Ct. 2946, — U. S. — (1981), Merrion v. Jicarilla Apache Tribe, 102 S. Ct. 894, — U. S. — (1982) and Thomas v. Gay, 169 U. S. 264 (1898).

The decision of the Ninth Circuit Court of Appeals directly conflicts with the decision of this Court in *Commonwealth Edison Co. v. Montana,* 101 S. Ct. 2946, — U. S. — (1981). In that case four coal producers and eleven out-of-state utilities which consume Montana's coal challenged the validity of Montana's coal severance tax.[4] This Court upheld the validity of the tax against challenges that it was a burden on interstate commerce and that the general policy of federal statutes had preempted the tax. Westmoreland Resources, was one of the coal producers denied exemption from the severance tax in *Commonwealth Edison,* yet that same corporation will get the windfall from any extension of an Indian tax immunity to a non-Indian enterprise in this case.

The Ninth Circuit Court of Appeals chose to ignore the entire *Commonwealth Edison* opinion because this case involves "Indian tribes, Indian-related activities and Indian trust property." Order denying rehearing, fn. 15a.[5]

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[4]Montana's gross proceeds from coal tax was not at issue in *Commonwealth Edison.*

[5]The Ninth Circuit also held that the incidence of the challenged taxes falls upon the coal producer. This is despite an

(Continued on following page)

We submit that *Commonwealth Edison* controls here, and that non-Indian coal producers are not exempt from the challenged taxes merely because Indian coal is being mined.

The lower Court held that Montana's taxes must be designed "to raise revenue to implement [the State's] legitimate regulatory responsibilities on the surface"; that only "a tax carefully tailored to effectuate the State's legitimate interests *might* survive (emphasis supplied)." 650 F. 2d at 1114.[6] Although the lower Court gave lip serv-

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alleged economic impact on the Crow Tribe. That should have ended the Court's inquiry. *See, e.g., Alabama v. King and Boozer,* 314 U. S. 1 (1941); *First Agricultural Nat. Bank v. Tax Commn.,* 392 U. S. 339 (1968).

[6]The Court of Appeals relied upon *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U. S. 134, 163 (1980), as requiring the tax be tailored or not survive judicial scrutiny. The tax referred to in *Colville* was an excise tax imposed on reservation Indians motor vehicles, mobile homes, campers and travel trailers. The State of Washington argued that *Moe v. Confederated Salish and Kootenai Tribes,* 415 U. S. at 480, 481, was not controlling because the Washington taxes were called excise taxes and were imposed for the privilege of using the vehicles in the State, while the Montana tax was labeled a personal property tax. The Court held that:

> We do not think *Moe* and *McClanahan* can be this easily circumvented. While Washington may well be free to levy a tax on the use outside the reservation of Indian owned vehicles, it may not under that rubric accomplish what *Moe* held was prohibited. Had Washington tailored its tax to the amount of actual off-reservation use, or otherwise varied something more than mere nomenclature, this might be a different case . . . 447 U. S. 134.

The Court of Appeals misapplied the holding in *Colville.* The "carefully tailored" tax requirement does not apply in this instance where the State of Montana is taxing a non-Indian coal producer's personal property, whether on or off of the reservation.

ice to the legitimate interests[7] asserted by the State it concluded "[o]n balance, we suspect that these legitimate interests will not be shown to be enough to save the severance tax from fatal conflict with the purposes behind the 1938 [Indian Mineral Leasing] Act." 650 F. 2d at 1114.

The Court of Appeals remanded this matter to the District Court with instructions to determine whether or not Montana's taxes are specifically related to the services rendered by the State. This is in direct conflict with *Commonwealth Edison* where this Court held that the determination of the proper rate of a tax was not the business of federal courts, not only because the rate is a matter for the political process, but also because the task of determining the rate is impossible for the courts to accomplish. 101 S. Ct. 2946, 2959, — U. S. —.

This Court has long recognized the impossibility and inadvisability of measuring general revenue taxes collected by the value of services to the taxpayer, even when the taxpayer is a non-Indian doing business with an Indian tribe. *Thomas v. Gay*, 169 U. S. 264 (1898). That case was cited in *Commonwealth Edison*, 101 S. Ct. at 2956, 2957, — U. S. —, as further support for the "consistent rule" that

> A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as

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[7]These legitimate interests were explored in detail in *Commonwealth Edison*. See Brief of Appellees 22-29.

> they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-522 (1937) (citations omitted).

Finally, this Court in *Merrion v. Jicarilla Apache Indian Tribe,* 102 S.Ct. 894, — U.S. — (1982), has held that *Commonwealth Edison* and its principles apply to Indians, Indian tribes, and Indian-related activities. This Court cited *Commonwealth Edison* as support for the authority of the Jicarilla Tribe to impose its own general revenue taxes upon those doing business with the Tribe, because "they benefit from the provision of police protection and other governmental services, as well as from 'the advantages of a civilized society'" that are assured by the existence of tribal government. 102 S.Ct. 894, 902, — U.S. —. This statement demonstrates that the tax authority of the Jicarilla Tribe is compared to the long recognized authority of the states to impose general revenue taxes upon those to whom the state provides general governmental services. As recognized in *Commonwealth Edison,* the State of Montana does provide those services to the non-Indian coal producers mining coal beneficially owned by the Crow Tribe, both on and off the Reservation.

The holding in *Commonwealth Edison* controls this case, notwithstanding the fact that the taxed entity happens to be doing business with an Indian tribe.

II. The decision below is in direct conflict with the decisions of this Court with regard to the 1938 Mineral Leasing Act.

The lower Court held that the general policies of the Mineral Leasing Act prohibit all taxes by the State of

Montana except those which are specifically tailored to the governmental costs associated with the taxed activity. This holding is directly contrary to *Commonwealth Edison*, in which similar general federal policies were held to be insufficient to preempt the coal severance tax. The lower Court's holding virtually eliminates the fundamental right of the state to have non-discriminatory general revenue taxes, even though the Crow Tribe under the *Jicarilla* decision would be permitted to have such a tax on reservation[8] without being required to specifically tailor the tax to any governmental costs incurred by the Tribe. Although the taxpayer, the non-Indian coal producer, takes advantage of all of the benefits of State government, the lower Court has made the non-Indian coal producer exempt from general revenue taxes.

There is nothing within the 1938 Indian Mineral Leasing Act which expressly or impliedly[9] immunizes the non-Indian coal producers from non-discriminatory state taxes. See, *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342 (1949), *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 150 (1973). Moreover, the very general policies of the Indian Mineral Leasing Act are not sufficient to pre-

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[8]The State contends that the Tribe's taxing authority under *Jicarilla* is limited to taxation of those doing business with the Tribe on tribal trust lands located on the reservation.

[9]The Ninth Circuit held that "no express congressional statement of preemptive intent is required . . ." and that a state law must be invalidated if it conflicts with a general federal policy, regulation or statute. Although that may be the law with regard to Indian tribes, *on reservation*, it is clearly not the law with regard to Indians in off reservation contexts, and with regard to non-Indians in either on reservation or off reservation contexts. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973). *See* Part III, *infra*.

empt state laws. This Court has never held that such general policies do preempt state law, but instead has consistently held that tax exemptions are not granted by implication, even when Indians are affected. *Mescalero Apache Tribe,* 411 U.S. at 156. In *Mescalero* this Court rejected an argument that Section 5 of the Indian Reorganization Act, 25 U.S.C. Section 465, exempted Indian Tribes from income as well as property taxes. Although the statute had a general policy to encourage tribal enterprises "to enter the white world on a footing of equal competition," 411 U.S. at 157, this Court refused to expand the tax immunity beyond the face of the statute in order to further the Act's general policy. Similarly, in *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134, 155 (1980), this Court again refused to hold that the general policies of statutes designed to encourage tribal self-government and economic development extended the tax immunities to non-Indians.

Recently this Court in *Jicarilla* rejected the arguments of petitioners that tribal taxation of oil and gas conflicted with general national energy policies, stating that:

> Petitioners cite no specific federal statute restricting Indian sovereignty. Nor do they explain why state taxation of the same type of activity escapes the asserted conflict with federal policy. Cf. *Commonwealth Edison Co. v. Montana,* 101 S.Ct. 2946, — U.S. — (1981). *Jicarilla,* 102 S.Ct. 894, 909, — U.S. —.

The lower Court's use of a general policy of the 1938 Mineral Leasing Act to invalidate Montana's taxes is thus in conflict with this Court's opinions.

Finally, the 1938 Indian Mineral Leasing Act through the Act of May 29, 1924, Ch. 210, 43 Stat. 244, 25 U. S. C. Section 398, specifically authorizes state taxation of production of Indian oil, gas and other minerals.[10] *See, British-American Oil Producing Co. v. Board of Equalization*, 299 U. S. 159 (1936). The 1938 Act did include a general repealing clause, Section 7, 52 Stat. 347 (uncodified) but the Act made no mention of the 1924 Act's express authorization of state taxation. Absent a clear expression of congressional intent to repeal, both Acts are to be given effect. *Morton v. Mancari*, 417 U. S. 535, 551 (1974). Thus the specific tax authorization contained in the 1924 Act remains in effect. That being the case, it would be completely inconsistent with the policy of that Act to exempt the non-Indian coal producer from all state taxation, while Indian mineral production itself is subject to the same state taxes.

The State recognizes that in *Jicarilla* this Court reserved judgment on the question of whether the Act of March 3, 1927, Ch. 299, 44 Stat. 1347, 25 U. S. C. Sections 398a-398e, which permitted state taxation of mineral lessees on Executive Order reservations, was repealed by the 1938 Act. *Jicarilla*, 102 S. Ct. at 909, — U. S. —, fn. 17. Nonetheless, the *Jicarilla* opinion is couched in terms which also recognize the continuing authority of the states to tax non-Indians doing business with Indian tribes, even when the tribe taxes the same activity. For example, through numerous citations in the opinion to the prior decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134 (1980),

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[10]The Indian royalty interest is not at issue in this case. See the lower Court opinion, fn. 4a.

this Court rejected the non-Indian petitioners' argument that congress had divested the tribes of the power to tax non-Indians by conferring that power upon the states. The *Jicarilla* opinion specifically quotes from the *Colville* decision (447 U. S. at 158): "There is no direct conflict between the state and tribal [taxing] schemes, since each government is free to impose its taxes without ousting the other." *Jicarilla,* 102 S. Ct. at 909. In further support of the proposition that states have continuing authority to tax, this Court noted (*Jicarilla,* 102 S. Ct. at 909) that the mere existence of state authority to tax does not deprive the Indian tribe of its power to tax, citing *Fort Mojave Tribe v. County of San Bernardino,* 543 F. 2d 1253 (9th Cir. 1976), *cert. denied,* 430 U. S. 983 (1977).

III. The decision below ignored a "significant geographic component" by failing to distinguish between the Crow Reservation proper and the ceded strip lands.

Although the State of Montana contends that its taxes are legitimately collected from non-Indian coal producers throughout the State of Montana regardless of whether they do business with an Indian tribe on or off reservation, the legitimacy of those taxes is especially clear with respect to Westmoreland Resources and other non-Indian coal producers mining coal within the ceded strip. The ceded strip, like all federally owned lands which were included in *Commonwealth Edison,* is part of the State of Montana and is land over which the State has full governmental responsibility and authority. Coal producers who operate within the ceded strip thus are identical in status to coal producers operating anywhere else within the State of Montana and are subject to the severance tax upheld in *Commonwealth Edison.*

As discussed in Part I. above, the lower Court required the State to prove exactly what its "legitimate interests" are for imposing its taxes on coal producers on the Reservation and the ceded strip. Not only is this in contravention of *Commonwealth Edison*, but it is evidence that the lower Court misapplied the "significant geographic component" referred to in *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136, 148. That component referred to the reservation proper of the White Mountain Apache Tribe. It was considered in the context of a state asserting its authority over activities of a non-Indian business operating solely *on* the reservation, without any operations within the remainder of the State of Arizona. The "geographic component" has never been used by this Court to extend the authority of an Indian tribe beyond its reservation's boundaries in order to displace or negate the legitimate governmental interests of the state. Instead, this Court has limited tax exemptions to on-reservation Indians, *McClanahan v. Arizona Tax Commission*, 411 U. S. 164 (1973), and has recognized that:

> Absent *express* federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State. (emphasis supplied.)
>
> *Mescalero Apache Tribe v. Jones*, 411 U. S. 145, 148-149.

The lower Court held that the "revenues sought to be taxed by Montana may ultimately be traced to the Tribe's mineral resources, a component of the reservation land itself." 650 F. 2d 1104, 1107 and 1118. Yet the Court held that no Indian land was being taxed since the incidence of

the taxes fell upon the coal producers. The lower Court's opinion is directly contrary to this Court's opinion in *Mescalero, supra,* where Indian income from off-reservation tribal activities was held to be taxable, although land and fixtures were exempt from taxation by virtue of express federal law.

The fact that the Crow Tribe owns the coal being mined by non-Indians on the ceded strip is not determinative of any issue in this litigation. The location of the coal off-reservation is of paramount importance, because on the ceded strip and everywhere else off-reservation the State has a strong legitimate governmental interest in raising revenues when, as here, "the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U. S. at 156-157.

———o———

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

RESPECTFULLY SUBMITTED this 1st day of April, 1982.

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Appendix

Supreme Court, U.S.
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81-1852

No. 81

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

CROW TRIBE OF INDIANS,

Respondents,

v.

STATE OF MONTANA, and
RAMONE DORE, Director,
MONTANA DEPARTMENT OF REVENUE,

Petitioners.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

No. CV-78-110-BLG

THE CROW TRIBE OF INDIANS,

FOREST HORN, a member of the Crow Tribe and Chairman of The Crow Tribal Council,

TED HOGAN, a member of the Crow Tribe and Secretary of the Crow Tribal Council,

JIGGS YELLOWTAIL, a member of the Crow Tribe, and

BARNEY OLD COYOTE, a member of the Crow Tribe,

Plaintiffs

v.

THE STATE OF MONTANA,

RAYMON DORE, Director, Montana Department of Revenue,

MARGARET WHEELER, Treasurer, Big Horn County, Montana,

BETTY WHALEY, Assessor, Big Horn County, Montana,

MAY JENKINS, Treasurer, Yellowstone County, Montana,

CREATH TOOLEY, Assessor, Yellowstone County, Montana,

KAREN VAN HAELE, Treasurer, Treasure County, Montana, and

BERNICE MOERKERKE, Assessor, Treasure County, Montana,

Defendants

SECOND AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs, the CROW TRIBE OF INDIANS, *et al.*, by their attorneys, bring this action against the above-named defendants and allege as follows:

JURISDICTION

1. This is a civil action for injunctive and declaratory relief. It arises under Article I, Section 8, Clause 3 of the Constitution of the United States; under the Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1970); under the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123; under the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1008; under Section 4 of the Enabling Act of February 22, 1889, 25 Stat. 676; and under 42 U.S.C. § 1983. The matter in controversy, exclusive of interest and costs, exceeds the value of ten thousand dollars. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343 and 1362. Venue is established under 28 U.S.C. § 1391(b).

PARTIES

2. Plaintiff CROW TRIBE OF INDIANS (hereinafter "the Tribe") is a sovereign American Indian tribe, with a governing body, the Cow Tribal Council, duly recognized by the United States Secretary of Interior. It brings this action on its own behalf and, as sovereign, on behalf of each of its members.

3. Plaintiff FOREST HORN is an enrolled member of the Tribe and Chairman of the Crow Tribal Council; he is a resident of the Crow Reservation. He brings this action on his own behalf and, as Chairman of the Tribe's governing body, on behalf of each of the Tribe's members.

4. Plaintiff TED HOGAN is an enrolled member of the Tribe and Secretary of the Crow Tribal Council; he is a resident of the Crow Reservation. He brings this action on his own behalf and, as Secretary of the Tribe's governing body, on behalf of each of the Tribe's members.

5. Plaintiff JIGGS YELLOWTAIL is an enrolled member of the Tribe; he is a resident of the Crow Reservation. He brings this action on his own behalf and on behalf of each of the Tribe's members.

6. Plaintiff BARNEY OLD COYOTE is an enrolled member of the Tribe. He brings this action on his own behalf and on behalf of each of the Tribe's members.

7. Defendant STATE OF MONTANA (hereinafter "State") is a sovereign State of the Union, pursuant to the Enabling Act of February 22, 1889, 22 Stat. 676.

8. Defendant RAYMON DORE is Director of the Montana Department of Revenue. He is sued in his official capacity; his official address is: Department of Revenue, Sam W. Mitchell Building, Helena, Montana 59601.

9. Defendant MARGARET WHEELER is Treasurer of Big Horn County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Hardin, Montana 59034.

10. Defendant BETTY WHALEY is Assessor of Big Horn County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Hardin, Montana 59034.

11. Defendant MAY JENKINS is Treasurer of Yellowstone County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Billings, Montana 59101.

12. Defendant CREATH TOOLEY is Assesor of Yellowstone County, Montana. He is sued in his official capacity; his official address is: County Courthouse, Billings, Montana 59101.

13. Defendant KAREN VAN HAELE is Treasurer of Treasure County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Hysham, Montana 59038.

14. Defendant BERNICE MOERKERKE is Assessor of Treasure County, Montana. She is sued in her official capacity; her official address is: County Courthouse, Hysham, Montana 59038.

STATEMENT OF THE CLAIM

15. The Constitution of the United States, Article I, Section 8, Clause 3, grants to the Congress of the United States exclusive authority over the regulation of commerce with Indian Tribes. That authority — which includes the power to tax Indians and Indian property — resides exclusively in the Congress, and only Congress can authorize a state or state-delegated body or official to exercise any portion of that power.

16. This exclusive jurisdiction was reaffirmed by the Mandan Village Treaty of August 4, 1825, 7 Stat. 266, II Kappler 244; by the Fort Laramie Treaty of September 17, 1851, 11 Stat. 749, II Kappler 594, IV Kappler 1067; by the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1008; and by Section 4 of the Enabling Act of February 22, 1889, 25 Stat. 676, pursuant to which the defendant State was admitted to the Union. It was expressly recognized by the defendant State in Section 2 of Ordinance 1 of the 1889 Constitution of the State of Montana and is today recognized in Article I of the 1972 Constitution of the State of Montana.

17. By the Fort Laramie Treaty of 1851, the United States recognized the aboriginal title of the Crow Indians to some 38,531,174 acres of land located in the Territories of Montana and Wyoming. The Fort Laramie Treaty of 1868 drastically reduced the territory by some 30,530,764.8 acres, leaving the Crow Indians with title to some 8,000,409.2 acres. That treaty guaranteed that this remaining land "shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the [Crow] Indians. . . ." 15 Stat. 650, II Kappler at 1008.

18. The Crow Reservation was further reduced in size by the Act of April 11, 1882, 22 Stat. 42; by the Act of July 10, 1882, 22 Stat. 157; and by the Indian Appropriation Act of March 3, 1891, 26 Stat. 989.

19. By the Act of April 17, 1904, 33 Stat. 352, a certain portion of the Crow Reservation — known as the "ceded area" was opened to allotment and non-Indian settlement. The mineral estate underlying the "ceded area" was never disposed of pursuant to that Act; it remains part of the Crow Reservation. Legal title to the mineral estate is vested in the United States as trustee for the plaintiff Tribe; beneficial title remains in the Tribe.

20. Congress has never authorized the defendant State of Montana to tax the property of the plaintiff Tribe held in trust by the United States, and the Tribe has never assented to such taxation. The defendant State has never amended its Constitution to assume jurisdiction of any kind pursuant to 25 U.S.C. § 1322 (1970) or the Act of August 15, 1953, Pub. L. No. 280, §§ 6, 7, 67 Stat. 588, 590.

21. In 1975, the defendant State enacted into law a statute, Ch. 525, L. 1975, Rev. Codes of Mont. §§ 84-1312 through 84-1325 (1977 Cum. Supp., v. 5, pt. 2), pursuant to which it purports to impose a severance tax "on each ton of coal produced in the state," [Rev. Codes of Mont. § 784-1314 (1977 Cum. Supp., v. 5, pt. 2)], and a gross proceeds tax upon the proceeds of all sales of coal mined in the state. [Rev. Codes of Mont. § 84-1322 (1977 Cum. Supp., v. 5, pt. 2)].

22. Defendants Dore, Wheeler, Whaley, Jenkins, Tooley, Van Haele and Moerkerke are the state and county officials charged by Montana law with the enforcement, assessment and collection of the Montana coal severance and gross proceeds taxes.

23. There are approximately 6,000 members of the plaintiff Tribe, approximately 4,500 of whom reside on the Crow Reservation. The Crow people retain a significant degree of tribal cutlure, maintaining the Crow language and Crow tribal ceremonies and customs. The Crow people to date have generally derived meager economic sustenance through the ownership and use of farming and grazing lands on the reservation. Historically, the Crow people have suffered from extremely high rates of unemployment and a very poor economic status. The development of tribal coal offers an unprecedented opportunity for the Crow people to improve their economic situation.

24. The United States holds in trust and the Tribe is the beneficial owner of vast coal resources underlying considerable amounts of the Crow Reservation, including the "ceded area." In all, the plaintiff Tribe is the beneficial owner of approximately six billion tons of coal.

25. Because the United States holds the Crow tribal lands, including the Crow coal resource in trust for the Tribe, it manages and supervises those trust assets through the Department of the Interior and the Bureau of Indian Affairs (hereinafter "BIA").

26. Since 1967, pursuant to the Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1970), the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123, the

United States Secretary of the Interior and the Commissioner of the BIA (now the Assistant Secretary of the Interior for Indian Affairs) have actively recommended, advised and approved transactions which have brought the Crow coal resources close to a point of massive development. In bringing these transactions about, the general practice of the Department of the Interior and the BIA since 1968 has been to (i) advertise for bids for two-year prospecting permits; (ii) recommend and approve two-year permits, containing exclusive options to lease, to successful bidders; (iii) recommend and approve two-year extensions of the permits with options to lease, as requested by permittees; and (iv) recommend and approve conversion of the permits into coal mining leases.

27. On September 16, 1970, Westmoreland Resources, Inc. (hereinafter "Westmoreland") was the successful bidder at a sale of prospecting permits covering Crow coal underlying 34,671 acres. On June 6, 1972, Westmoreland and the Tribe executed two leases embracing the coal underlying 30,876.25 acres of that land. The Westmoreland leases were approved by the BIA on June 14, 1972. Those leases were subsequently amended, and the amended Westmoreland leases were approved on December 6, 1974. Westmoreland is the only lessee currently mining Crow coal.

28. The BIA has also approved prospecting permits on the Crow Reservation to Gulf Oil Company, Peabody Coal Company, Shell Oil Company (hereinafter "Shell"), and American Metal Climax, Inc. (hereinafter "AMAX"). It has approved renewals of all those permits for two years. Additionally, it has approved the conversion of the Shell and AMAX permits into leases. The validity of the BIA's approval of those permits and leases is currently the subject of litigation in *Crow Tribe of Indians* v. *Andrus*, CV-76-10-BLG, D. Mont. (Billings Division).

29. The plaintiff Tribe is also the beneficial owner of other extensive coal deposits which it has not yet undertaken to develop. One such deposit underlies that portion of the reservation proper commonly known as the "reserve area."

30. On January 31, 1976, the plaintiff Tribe enacted its own tribal coal taxation code, which imposes upon persons mining Crow

coal a severance tax of 25 percent of the value of Crow coal mined by such persons, including the lessees identified in paragraphs 27 and 28 of this Complaint. On January 17, 1977, the Secretary of the Interior approved the Crow taxation code to the extent that it applied to coal underlying the Crow Reservation proper.

31. On March 3, 1978, the Assistant Secretary of the Interior disapproved, on procedural grounds, an amendment to the Crow Constitution which would have had the effect of applying the tribal tax ordinance to the removal of coal underlying the "ceded area." The plaintiff Tribe has undertaken to comply with all procedural requirements, and will soon amend its Constitution so as to extend its tax ordinance to embrace all Crow coal underlying the "ceded area." Approval of the Tribe's taxation of "ceded area" coal will be sought immediately thereafter.

32. The Crow tribal severance tax, enacted in an exercise of the Tribe's sovereignty and approved by the Secretary of the Interior pursuant to congressionally delegated authority in the implementation of federal policy, preempts state taxation of the subject coal.

33. Pursuant to Section 84-1315 of the Revised Codes of Montana, Westmoreland — the only lessee actively mining Crow coal — has, since 1975, computed and paid on a quarterly basis the state severance tax imposed by Section 84-1314. Because the Westmoreland mining operation involves surface mining of high-quality coal, it has been required by the defendant State to pay a tax equal to 30 percent of the value of all Crow coal it has mined. Through March 31, 1978, Westmoreland paid $15,481,262.23 in severance taxes to the defendant State. In that same period of time, Westmoreland paid only $5,524,638.68 to the plaintiff Tribe in royalties.

34. Since 1976, Westmoreland also has reported (on an annual basis) gross proceeds from its sales of Crow coal, pursuant to Section 84-1320 of the Revised Codes of Montana, and has paid (also on an annual basis) the gross proceeds tax imposed by Section 84-1322 of the Revised Codes of Montana. At the present time, plaintiffs are without knowledge of the amounts of gross proceeds taxes Westmoreland has been required to pay on the proceeds from its sales of Crow coal.

35. The imposition, assessment and collection of the 30-percent state severance tax and the gross proceeds tax have imposed a direct and severe burden upon the plaintiff Tribe in that the taxes are a direct and major cost associated with the production of Crow coal by Westmoreland.

36. The natural and immediate consequences of the imposition, assessment and collection of these taxes have been: (i) drastically increased costs to purchasers of Crow coal; (ii) a correspondingly severe restriction upon the amount of royalty payments which Westmoreland has been willing to pay to the plaintiff Tribe under its leases; and (iii) the frustration of efforts by the Tribe to renegotiate its leases with Westmoreland. The state severance and gross proceeds taxes have already adversely affected the competitive status of Crow coal, and, when taken in conjunction with the Crow tribal tax, may increase the cost of Crow coal so drastically as to render that coal noncompetitive in the marketplace and thereby threaten to preclude further Crow coal development.

37. The existence of the 30-percent state severance tax and the gross proceeds tax has frustrated efforts by the Tribe to negotiate (or renegotiate) leases with the other Crow permittee and lessees — Shell, Peabody, Gulf, and AMAX — and has severely depressed the amount of royalties which those permittees and lessees are willing and able to pay to the Tribe under any such leases or pursuant to other arrangements.

38. The existence of the 30-percent state severance tax and the gross proceeds tax has also frustrated efforts by the Tribe to offer permits and leases covering additional coal deposits in the "reserve area" and elsewhere on the reservation. It has also rendered the Tribe incapable of entering into any fair arrangements for the development of tribal coal or of developing its own coal pursuant to mining contracts with persons capable of performing the actual mining of such coal.

39. The imposition, assessment and collection of the 30-percent state severance tax and the gross proceeds tax upon Crow coal held in trust by the United States have: (i) illegally subjected the property of the sovereign Crow Tribe to an unauthorized state tax, in

violation and/or derrogation of Article I, Section 8, Clause 3 of the United States Constitution; the Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1970), the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123; the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1008; and Section 4 of the Enabling Act of February 22, 1889, 22 Stat. 676; (ii) illegally reduced the ability of the sovereign Crow Tribe and its members to realize full benefit, use and development of their land, thereby depriving them of liberty and property without due process of law, in violation of the fourteenth amendment of the United States Constitution and of the Tribe's civil rights and the civil rights of its members; (iii) illegally threatened the ability of the sovereign Crow Tribe to exercise its sovereignty through its lawful tribal tax; (iv) illegally and severely infringed upon the right and ability of the sovereign Crow Tribe to govern itself and its people; and (v) illegally and severely impaired the ability of the sovereign Crow Tribe to serve its people through its various tribal programs and governmental services, including but not limited to its vitally important land repurchase program, its tribal cultural and historical program, its tribal educational program and its reservation maintenance services.

40. Prior to and since the enactment of the challenged tax laws, Crow tribal representatives, by correspondence and by testimony before the Montana legislature, have consistently protested the imposition of these unlawful taxes upon Crow coal, to no avail.

41. Plaintiffs are without recourse to any remedies other than those sought by this Complaint and, unless such relief is granted, they will continue to suffer immediate and irreparable injury.

WHEREFORE, plaintiffs demand judgment

1. Declaring that Sections 84-1312 through 84-1325 of the Revised Codes of Montana, to the extent that they purport to impose a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe, and a gross proceeds tax upon the sale of such coal, are violative of Article I, Section 8, Clause 3 of the United States Constitution and are therefore unconstitutional, null and void;

2. Declaring that Sections 84-1312 through 84-1325 of the Revised Codes of Montana, to the extent that they purport to impose a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe and a gross proceeds tax upon the sale of such coal, deprive the Tribe and its members of rights secured to them by the Mineral Leasing Act of 1938, as amended, 25 U.S.C. §§ 396a-396f (1970), the Act of September 16, 1959, 73 Stat. 565, and the Act of May 17, 1968, 82 Stat. 123, and are therefore null and void;

3. Declaring that Sections 84-1312 through 84-1325 of the Revised Codes of Montana, to the extent that they purport to impose a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe and a gross proceeds tax upon the sale of such coal, deprive the Tribe and its members of rights and property secured to them by the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, II Kappler 1008, and are therefore null and void;

4. Declaring that Sections 84-1312 through 84-1325 of the Revised Codes of Montana, to the extent that they purport to impose a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe and a gross proceeds tax upon the sale of such coal, are violative of Section 4 of the Enabling Act of February 22, 1889, 25 Stat. 676 and are therefore null and void;

5. Declaring that the defendants' imposition, assessment and collection of an unconstitutional and illegal severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe and a gross proceeds tax upon the sale of such coal, pursuant to Sections 84-1312 through 84-1325 of the Revised Codes of Montana, deprive the Tribe and its members of liberty and property without the protection of due process of law, in violation of the fourteenth amendment of the United States Constitution and in violation of the civil rights of the plaintiffs and other members of the plaintiff Tribe;

6. Declaring that Sections 84-1312 through 84-1325 of the Revised Codes of Montana, to the extent that they purport to impose a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe and a gross proceeds tax

upon the sale of such coal, (i) unlawfully impair the right of the plaintiff Tribe to selfgovernment and (ii) are preempted by the Tribe's own lawfully enacted severance tax, and are therefore null and void;

7. Enjoining the defendants, their agents, servants, employees, and attorneys from enforcing and/or taking any action pursuant to Sections 84-1312 through 84-1325 of the Revised Codes of Montana which would result directly or indirectly in the imposition, assessment or collection of a severance tax upon the removal of coal held in trust by the United States for the benefit of the plaintiff Tribe or a gross proceeds tax upon the sale of such coal;

8. Ordering that the defendants pay to the plaintiffs the costs of this litigation, including attorney's fees; and

9. Awarding to the plaintiffs such other relief as the Court may deem just and proper.

Respectfully submitted,

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APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

No. CV-78-110-BLG

THE CROW TRIBE OF INDIANS,

FOREST HORN, a member of the Crow Tribe and Chairman of The Crow Tribal Council,

TED HOGAN, a member of the Crow Tribe and Secretary of the Crow Tribal Council,

JIGGS YELLOWTAIL, a member of the Crow Tribe, and

BARNEY OLD COYOTE, a member of the Crow Tribe,

Plaintiffs,

v.

THE STATE OF MONTANA,

RAYMON DORE, Director, Montana Department of Revenue,

MARGARET WHEELER, Treasurer, Big Horn County, Montana,

BETTY WHALEY, Assessor, Big Horn County, Montana,

MAY JENKINS, Treasurer, Yellowstone County, Montana,

CREATH TOOLEY, Assessor, Yellowstone County, Montana,

KAREN VAN HAELE, Treasurer, Treasure County, Montana, and

BERNICE MOERKERKE, Assessor, Treasure County, Montana,

Defendants.

I. BACKGROUND

The plaintiffs in this case are the Crow Tribe of Indians and several individually named members of the Crow Tribe. The defendants are the State of Montana, Raymon Dore, Director of the Montana Department of Revenue, and the individually named county treasur-

ers and assessors for Big Horn, Yellowstone, and Treasure Counties, all in the District of Montana; and Westmoreland Resources, Inc., defendant in intervention.

For the purposes of this action, the Crow Reservation must be divided into two distinct legal entities. The Reservation proper consists of that territory granted to the Tribe by the Fort Laramie Treaty of 1851, 11 Stat. 749, II Kappler 594, as reduced by the Fort Laramie Treaty of 1868, 15 Stat. 649, II Kappler 1008, and by the Act of April 11, 1882, 22 Stat. 42, the Act of July 10, 1882, 22 Stat. 157, and by the Indian Appropriation Act of March 3, 1891, 26 Stat. 989. The "ceded area" or "ceded strip" is that area of land consisting of about 1,137,500 acres ceded by the Tribe to the United States in order to open the area to non-Indian entry and settlement, pursuant to the Act of April 27, 1904, 33 Stat. 352.

The surface estate to most of the ceded Crow land was disposed of by the Government pursuant to the provisions of the 1904 Act, but very little of the subsurface estate was ever sold by the Government. Virtually the entire Tribal mineral estate has been preserved and remains in the United States in trust and for the benefit of the Crow Tribe.

Underlying both the Reservation proper and the ceded strip are vast deposits of coal. Since 1967, the Secretary of the Interior and the Commissioner of Indian Affairs (now the Assistant Secretary of the Interior for Indian Affairs), have actively encouraged and approved prospecting permits and mining leases, all of which has brought large scale development of the coal resources underlying both the Reservation and the ceded area very near reality. All mining and prospecting activities initiated to date have been entered into and approved pursuant to the statutory requirements of the Mineral Leasing Act of 1938 [Act of May 11, 1938], 52 Stat. 347 (codified at 25 U.S.C. §§ 396a through 396f), as well as the Department of the Interior regulations under the 1938 Act, 25 C.F.R. part 171 (1977).

To date, only one lessee, Westmoreland Resources, Inc. (hereinafter, "Westmoreland"), has undertaken active mining operations in the area in question. The successful bidder at a 1970 Bureau of Indian

Affairs sale of Crow prospecting permits, Westmoreland entered into two mining leases with the Tribe in 1972. Those leases, embracing coal underlying some 30,876.25 acres of land in the ceded area, were amended in 1974 and approved later the same year.

In 1975, the State of Montana enacted a series of statutes, Revised Codes of Montana (1947) (hereinafter, "R.C.M., (1947)"), §§ 84-1312 — 84-1325 (now, M.C.A. §§ 15-35-101 — 15-35-109) by which was imposed upon coal mine operators a severance tax on each ton of coal produced in the State and a gross proceeds tax on the sale of each ton of coal produced in the State. Pursuant to the Montana statutes, Westmoreland has paid, since 1975, $17,797,096.62 in severance taxes and $1,707,320 in gross proceeds taxes to the State. In that same period of time, Westmoreland has paid, pursuant to its lease, $5,514,955.06 in royalties, all of which has been paid to the Tribe.

On January 31, 1976, the Crow Tribe enacted its own coal tax code, imposing a severance tax of 25% of the value of coal mined by lessees on the Reservation. The Crow coal tax code was approved as to taxation of coal underlying the Reservation proper, but, on March 3, 1978, was disapproved as to taxation of coal underlying the ceded area.

The Tribe has instituted this action, seeking a declaration that R.C.M., (1947) §§ 84-1312 through 84-1325 are violative of Article I, Section 8, Clause 3 of the Constitution of the United States, as the statutes invalidly impose severance and gross proceeds taxes on Crow coal. The Tribe has further sued for a declaration that the Montana statutes deprive the Tribe of rights secured to it by the Mineral Leasing Act of 1938 and the Treaty of Fort Laramie, and as such are void; for a declaration that the taxes in issue are violative of the due process provisions of the Fourteenth Amendment as well as the civil rights of the individually named plaintiffs and other members of the Tribe; and for a declaration that the State taxes impede Tribal self-government and are preempted by the Tribal ordinance imposing a severance tax on coal. Finally, the plaintiffs seek an injunction preventing the further imposition, assessment, or collection of coal severance or coal gross proceeds taxes by the defendant State of Montana.

The plaintiffs moved for, and were granted, leave to file a second amended complaint. The gravamen of the second amended complaint is that the State taxes, when imposed in conjunction with Tribal taxes, may raise the cost of producing coal under a Tribal lease to the point of economic unfeasability, with the ultimate result that coal underlying Reservation and ceded lands may suffer from non-development. In essence, the State taxation is alleged to have:

(i) Illegally subjected the property of the sovereign Crow Tribe to an unauthorized state tax, in violation and/or derogation of Article I, Section 8, Clause 3 of the United States Constitution; the Mineral Leasing Act of 1938, as amended [citation omitted], and the Act of May 17, 1968 [citation omitted]; and the Fort Laramie Treaty of May 7, 1868 [citation omitted];

(ii) Illegally reduced the ability of the sovereign Crow Tribe and its members to realize full benefit, use and development of their land, thereby depriving them of liberty and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution and of the Tribe's civil rights and the civil rights of its members;

(iii) Illegally threatened the ability of the sovereign Crow Tribe to exercise its sovereignty through its lawful tribal tax;

(iv) Illegally and severely infringed upon the right and ability of the sovereign Crow Tribe to govern itself and its people; and

(v) Illegally and severely impaired the ability of the sovereign Crow Tribe to serve its people through its various tribal programs and governmental services, including but not limited to its vitally important land repurchase program, its tribal cultural and historical program, its tribal educational program and its reservation maintenance services.

The State of Montana has moved to dismiss the second amended complaint on three grounds:

(1) The State has moved to dismiss the claims of the Tribe on the grounds that the second amended complaint fails to state a claim upon whiich relief may be granted.

(2) The individually named defendants, Whaley, Tooley, and Morekerke, have moved to dismiss on the grounds that as to them the second amended complaint fails to state a claim upon which relief may be granted.

(3) The State of Montana has moved to dismiss the claims of the individually named plaintiffs, Horn, Hogan, Yellowtail, and Old Coyote, on the grounds that the Court lacks subject matter jurisdiction over their claims.

As the plaintiffs have conceded that the position of the individually named defendants is well taken, and as the plaintiffs do not object to dismissal of the second amended complaint as to those defendants, there remain only two grounds to be addressed in considering defendants' motion to dismiss.

II. STATE OF MONTANA'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM.

The plaintiffs have argued specifically, in opposition to the State's motion to dismiss, that the complaint in issue states a claim for the following reasons:

A) The Montana coal severance tax and gross proceeds tax are without Congressional authorization;

B) The Montana coal severance tax and gross proceeds tax impair the plaintiffs' right to self-government;

C) The Montana coal severance tax and gross proceeds tax are preempted by federal law and by the Crow tribal coal tax.

D) The Montana coal severance tax and gross proceeds tax are violative of the State's Enabling Act and Constitution.

Upon consideration of each of plaintiff's arguments, it is evident that, on its motion to dismiss, the State of Montana must prevail.

A. Congressional Authorization Of The Montana Coal Severance And Gross Proceeds Taxes.

In arguing that the taxes in issue are unconstitutional as applied to the coal underlying both the Reservation proper and the ceded strip, the plaintiffs have first advanced the argument that the State of

Montana lacked the necessary Congressional authority to enact the taxing statutes. The bulwark of plaintiffs' argument in this regard is that Article I, Section 8, Clause 3 of the Constitution, which vests in Congress the exclusive authority "[t]o regulate Commerce . . . with the Indian Tribes," and the case law construing it, prohibit the State taxation here in issue. In analyzing plaintiffs' argument concerning the necessity of Congressional authorization, the major premise of the Tribe's argument is shown to be that, in the absence of express congressional authorization, the states are powerless to control or regulate Indian tribes or tribal trust lands. The plaintiffs rely heavily on *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973). In that case it was held that:

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan* v. *Arizona State Tax Comm'n, supra*, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent.
>
> *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 148.

In urging *Jones* as authority for their position that congressional approval is required in order for the State taxes here in issue to be properly levied, the plaintiffs overlook two things. First, the holding of *Jones*, in which the State of New Mexico was found to have the power to impose a nondiscriminatory gross receipts tax on a ski resort operated by the tribe on off-reservation land, is substantially broader than plaintiffs have indicated. In that case, the Court stated further:

> At the outset, we reject — as did the state court — the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise "[w]hether the enterprise is located on or off tribal land."
>
> *Jones*, 411 U.S. at 147.

The Court further stated that, in light of New Mexico's Enabling Act:

> It is thus clear that in terms of general power New Mexico retained the right to tax, unless Congress forbade it, all Indian

> land and Indian activities located on or occurring "outside of an Indian reservation."
>
> 411 U.S. at 149-150.

The *Jones* case is not, as plaintiffs urge, a broad prohibition of State taxation, but rather, is limited to a prohibition of taxation by the states of land utilized by a tribe or tribal enterprise pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465. In *Jones*, it is further stated that:

> Section 465 provides, in part, that "any lands or rights acquired" pursuant to any provision of the Act "shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." [Footnote omitted.] On its face, the statute exempts land and rights in land, not income derived from its use. It is true that a statutory tax exemption for "lands" may, in light of its context and purposes, be construed to support an exemption for taxation on income derived from the land. [Citations omitted.] But, absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax.
>
> 411 U.S. at 155-156.

The second misconception nurtured by the plaintiffs throughout their argument is the assertion that the taxes here in issue are imposed upon the Tribe or upon tribal trust land. The Montana statutes imposing the tax in issue are R.C.M., (1947) §§ 84-1314 and 84-1320-1322. Section 1314 provides:

> A severance tax is imposed upon each ton of coal produced in the state, in accordance with the following schedule: . . . A person is not liable for any severance tax upon 20,000 tons of coal he produces in a calendar year.

Under Section 1313, "produced" means "severed from the earth." Section 1320 provides:

> Each person engaged in mining coal must, on or before March 31 each year, file with the department of revenue a statement of

> the gross yield from each coal mine owned or worked by such person in the proceeding calendar year and the value thereof. . . .

It is upon the basis of the report provided pursuant to § 1320 that the coal gross proceeds tax is levied.

It is evident from a reading of the taxing statutes that neither operates as a tax upon the Tribe, tribal trust lands, or the income of individual members of the Tribe. Rather, each tax is imposed upon the operators of coal mines — in this case, Westmoreland. The plaintiffs argue that, as the severance tax is imposed upon the coal, it is imposed upon a tribal trust estate. This argument must fail. Neither tax is imposed until such time as the coal has been severed from the leased realty, upon which occurrence the coal becomes the personalty of the mine operator.

The plaintiffs have not seriously contended that the State of Montana has no power to regulate Westmoreland's operations, be they on reservation or off reservation in location. It is well settled that Montana may tax the property and receipts of Westmoreland and other non-Indian entities within the exterior boundaries of the State of Montana, whether on tribal trust land or not, *Thomas* v. *Gay*, 169 U.S. 264 (1898), *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342 (1949), and congressional authorization is not required in order for the State to exercize its sovereignty.

The question of whether the Tribe, were it a mine operator, would be subject to State taxation upon coal produced on the reservation, or whether the Tribe would enjoy an immunity from State taxation of coal production, it is well settled that a non-Indian lessee of the Tribe would not share in that immunity. As the plaintiffs themselves have stated in their brief, the Mineral Leasing Act is silent on the question of taxing authority and tax immunity. Absent express statutory exemption from taxation, no such exemption may be inferred.

> This Court has repeatedly said that tax exemptions are not granted by implication. . . . It has applied that rule to taxing acts affecting Indians as to all others. . . . If Congress intends to prevent the State of Oklahoma from levying a general nondiscriminatory estate tax applying alike to all its citizens, it

> should say so in plain words. Such a conclusion cannot rest on dubious inferences.
>
> *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, at 606-607 (1943)

There are no allegations in the complaint that the taxes in issue violate a specific congressional prohibition of such taxation, or that they are discriminatory in effect. The only allegations plaintiffs offer are that the taxes are levied against "Crow coal," and that because the taxes are imposed against Indian or tribal realty, they must have the approval of Congress as a condition precedent to their validity. The plaintiffs' argument is clearly erroneous. The taxes in issue are levied against a non-Indian mine operator, as taxes upon personalty and income. The argument that such an obviously proper exercise of State sovereignty somehow requires prior congressional approval is without merit.

Conceptually, two relationships exist among the parties to this dispute. The Tribe, with the approval of the Secretary of the Interior and under the aegis of the Mineral Leasing Act of 1938, has entered into a mineral lease agreement with Westmoreland. That agreement has been reached in the proper procedural manner, with both parties following the administrative guidelines established by Congress and the Department of the Interior. No claim has been made by any party that the leases themselves were entered into without congressional authority or consent, and, by the admission of each party, such a claim could not properly be raised.

The second relationship in this dispute is that between Westmoreland and the State of Montana. By doing business within the State, Westmoreland has voluntarily subjected itself to the laws of the State, including those laws governing taxation. Although Montana may require congressional authorization to tax the Tribe or individual Indians on their income, as a result of congressionally established immunity from such taxation, it cannot be said that a non-Indian lessee of the Tribe stands in the same relationship to the State as the Tribe itself. Clearly, the State of Montana need not secure the prior approval of Congress in order to tax a non-Indian enterprise doing business within the boundaries of the State. As was stated by the

Supreme Court, in an opinion considering the relationship of a non-Indian lessee of Indian land to the State of Oklahoma:

> We do not imply, by this decision, that Congress does not have power to immunize these lessees from the taxes we think the Constitution permits Oklahoma to impose in the absence of such action. [Footnote omitted.] The question whether immunity shall be extended in situations like these is essentially legislative in character. But Congress has not created an immunity here by affirmative action, [footnote omitted] and "The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication." [Citations omitted.] ". . . if it appears that there is no ground for implying a constitutional immunity, there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity."
>
> *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342, 365-366 (1949).

No congressional enactment conferring state tax immunity upon lessees of Indian minerals has been cited by counsel, and we are aware of none. Further, that the Indian Reorganization Act has no bearing on Westmoreland's tax obligation to the State of Montana is made plain by *The Fort Mojave Tribe* v. *The County of San Bernardino*, 543 F.2d 1243 (9th Cir. 1976). In that case the Ninth Circuit held that "[w]e . . . refuse to find that the [Indian Reorganization] Act created a tax exemption for non-Indian lessees of Indian land." 543 F.2d at 1256. Further,

> When the state action is directed at non-Indians, with only indirect effects on Indians or Indian lands, it is necessary to reconcile the federal preemption rationale with the state's recognized authority to regulate its citizens. [Citation omitted.] Reconciliation requires that state legislation primarily directed at non-Indian lessees of Indian land be considered as not automatically preempted by the federal government in the absence of specific authorization. [Citations omitted.] To permit such non-Indians to enjoy the immunity designed for Indians requires, we believe, a stronger Congressional signal than a statute which neither precludes nor authorizes the taxation in question.
>
> 543 F.2d at 1257

Absent a specific congressional mandate to the contrary, Montana has the power, in its sovereign capacity, to tax a non-Indian enterprise within its boundaries, even if the situs of the enterprise is within the exterior boundaries of an Indian reservation. This power is freely exercisable by the State without consent or authorization of Congress. Clearly, no affirmative congressional authority exists for the Montana taxing statutes here in issue, for none is needed.

B. Interference With Tribal Self-Government

It is the plaintiffs' contention with respect to the issue of whether the State taxes impede or impair tribal self-government that both because the economic effects of the tax fall upon the Tribe and because the Tribe is economically restrained from either receiving greater royalties or imposing its own tax upon coal production, the taxes in issue run afoul of the protection of tribal self-government affirmed in *Williams* v. *Lee*, 358 U.S. 217 (1959), and the cases following it. The text established by *Williams* for whether a state law impairs tribal self-government, and is hence subject to attack, has been stated as:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be governed by them.
>
> *Williams*, 358 U.S. at 220.

And further:

> If a tribe has proved and/or a state concedes that the state [statute] causes an actual interference with the performance of the [tribe's] governmental obligations, the courts must, consistent with *Williams*, strike the [statute] down.
>
> *Confederated Tribes of the Colville Reservation* v. *Washington*, 446 F.Supp. 1339, 1363-1364 (E.D. Wash. 1978).

The Tribe rests its allegations of interference with self-government upon the relative economic benefits realized by the State and the Tribe as a result of Westmoreland's mining operations. The Tribe contends that because the State derives more revenue through its taxation of Westmoreland's operations than does the Tribe through its royalty

agreement with Westmoreland, tribal self-government is greatly impaired. However, the fact remains that the lease agreements between the Tribe and Westmoreland were freely and voluntarily entered into by both parties and approved administratively. The royalty to be paid by Westmoreland upon the coal produced pursuant to the lease must be assumed to have been a point of negotiation. As with any arm's length transaction, the Tribe was free either to accept or reject the terms offered by Westmoreland. In other words, the revenue received by the Tribe as a result of Westmoreland's operations is not, as plaintiffs argue, a result of State taxation; rather, it is a product of the Tribe's own bargaining at the time the leases were entered into by both parties.

The plaintiffs have further argued that the State taxes interfere with the Tribe's ability to control the scope and timing of development of its coal resources, and that such an interference is contrary to the protection accorded Indian tribes by *Williams* v. *Lee* and *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1976). The plaintiffs cite *Santa Rosa* for the proposition that

> . . . tribal use and development of tribal trust property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life. Extension of local jurisdiction to the reservation would burden that development by increasing its cost. . . . But more critically, subjecting the reservation to local jurisdiction would dilute if not altogether eliminate Indian political control of the timing and scope of the development of reservation resources. . . .
>
> *Santa Rosa*, 532 F.2d at 664.

It must be borne in mind, however, in considering the impact of authority such as *Santa Rosa* upon resolution of the instant case that there is a distinct factual dissimilarity between the two cases. In *Santa Rosa*, an Indian tribe and two of its members brought an action for declaratory and injunctive relief to restrain enforcement of certain county ordinances. The district court granted the requested relief, and the county appealed. The Court of Appeals held that the county was without jurisdiction to enforce its zoning ordinances or building code on Indian reservation trust land, and that the courts must determine on

a case-by-case basis when concrete disputes arise whether a county has jurisdiction to enforce any particular ordinance against Indian reservation or trust land. In so holding, the Court of Appeals stated:

> At the outset, we emphasize that this suit involves an attempt to regulate Indian use of Indian trust lands. We are clear, regardless of the modification worked in the exclusive Federal jurisdiction and tribal sovereignty doctrines of *Worcester* v. *Georgia*, 31 U.S. (6 Pet. 515) 350, 8 L.Ed. 483 (1832), by subsequent Court decisions such as *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed. 2d 573 (1962) and *Williams* v. *Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), that in any event any concurrent jurisdiction the states might inherently have possessed to regulate Indian use of reservation lands has long ago been preempted by extensive Federal policy and legislation.
>
> *Santa Rosa*, 532 F.2d at 658.

The essential question addressed by the Court in *Santa Rosa* was one involving construction of Public Law 280, 28 U.S.C. § 1360, which vests in certain enumerated states civil jurisdiction over certain enumerated tribes. The Court of Appeals held, in essence, that Public Law 280 subjected Indian country only to the civil laws of the state and not to local (county) regulation. In so holding the Court stated that:

> From that perspective, we conclude that Congress did not contemplate immediate transfer to local governments of civil regulatory control over reservations. Prior to passage of P.L. 280, Congress had encouraged, under § 476 of the Indian Reorganization Act, the formation and exercise of tribal self-government on reservation trust lands. A construction of P.L. 280 conferring jurisdiction to local county and municipal governments would significantly undermine, if not destroy, such tribal self-government. By transferring regulation of all matters of local concern to local governments, the tribal government would be left little or no scope to operate. We think it more plausible that Congress had in mind a distribution of jurisdiction which would make the tribal government over the reservation more or less the equivalent of a county or local government in other areas within the state, empowered, subject to the para-

> mount provisions of state law, to regulate matters of local concern within the area of its jurisdiction.
>
> *Santa Rosa*, 532 F.2d at 662-663.

It must be borne in mind in considering the holding of *Santa Rosa* that the local governmental controls being attacked in the case were zoning controls imposed by the defendant, Kings County. It must also be borne in mind that the reservation had, by virtue of Public Law 280, already been totally subjected to the jurisdiction of the *State* of California. The distinction between *Santa Rosa* and the instant case is obvious; the contrast of local governmental zoning control over Indian housing on Indian trust land to state taxation of a non-Indian enterprise on land that has been ceded by the Crow Tribe to the United States reveals that on the facts alone, *Santa Rosa* is inapplicable in this case. As a matter of law, the remote economic effect to the Tribe of Montana's taxation of Westmoreland's production and income arising out of operation under tribal coal leases — economic effect which is so remote as to have thus far evaded definition — is insufficient to constitute an interference with Crow tribal self-government.

C. Preemption

Intertwined with their argument that the taxes in issue impermissibly interfere with tribal self-government is plaintiffs' claim that the State taxes have been preempted by the Crow tribal coal tax. In so arguing they allege that the Montana taxes conflict with the taxes imposed by the Tribe, serving to reduce the amount of revenue the Tribe is able to receive as a result of Westmoreland's production. The Montana taxes, the plaintiffs argue, run afoul of the holding in *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 691 (1965), wherein it was stated that a

> . . . state tax on gross income would put financial burdens on [the non-Indian trader] or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians. . . .

However, the question of preemption raised by the plaintiffs in this case is quite different from the question addressed by the Court in *Warren Trading Post*. In that case the appellant, an operator of a retail trading post on the Navajo Indian Reservation, under a license granted by the Commissioner of Indian Affairs pursuant to 25 U.S.C. § 261, challenged the right of Arizona to levy a tax on his income from trading with reservation Indians on the Reservation. The Supreme Court, in invalidating Arizona's tax, held that since Congress had broadly occupied the field of trading with Indians on reservations by all-inclusive regulations and statutes, the states may not permissibly impose additional burdens on the traders or the Indians. In speaking about the federal regulatory framework by which Indian traders are governed, the Court said:

> [T]hese apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens on traders.
>
> *Warren Trading Post*, 380 U.S. at 690.

In the instant case, however, there is no body of federal law either governing the method by which coal underlying reservation lands is to be taxed or immunizing non-Indian lessees from the application of state law. A Ninth Circuit case *The Fort Mojave Tribe* v. *The County of San Bernardino*, 543 F.2d 1243 (9th Cir. 1976), is instructive upon the application of the doctrine of preemption to taxation of non-Indian lessees of Indian trust land. In that case, appeal was taken from the judgment of the United States District Court for the Central District of California, upholding a possessory interest tax imposed by the defendant County on non-Indian lessees of land held in trust for the Fort Mojave Indian Tribe. The Court of Appeals held that imposition of possessory interest taxes on non-Indian lessees did not violate the Indian Reorganization Act, and was not invalid as being an infringement upon the Tribe's right to govern itself. Further, it was held that imposition of possessory interest taxes by both the Fort Mojave Indian Tribe and San Bernardino County on non-Indian lessees of Indian land did not result in improper double taxation. The essence of the Fort Mojave decision was that the concept of Indian sovereignty is

no longer the proper major focus of analysis in taxing situations. Rather, the inquiry is one involving analysis of the applicable federal statutes to determine whether state action has been preempted. If not, the state statute need only satisfy the test laid down in *Williams* v. *Lee*, 358 U.S. 217 (1958), which is that it not infringe on the rights of reservation Indians to make their own laws and be governed by them. Federal statutes clearly have not preempted the area of a state's taxation of coal production within its exterior boundaries, even if that coal lies under Indian reservation lands. The Mineral Leasing Act, as well as the other federal statutes governing lease by the Crow Tribe of the coal estate in question, is silent as to taxation. The Tribe is not, of course, prevented from enacting taxing measures of their own, which, to a certain degree, has already been done. Should the Tribe do so, however, the mere enactment of a tribal taxing statute would not preempt the state statute taxing the same subject matter. As was stated by the Court in *Fort Mojave*, in considering the problem of taxation of the same subject matter by both the County and the Tribe:

> The assertion that "double taxation," resulting from the imposition of a tax both by the county and the tribe, impairs the ability of the tribe to levy its tax is not persuasive. There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. The tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power. We hold that the uncertain economic burden here imposed on the tribe's ability to levy a tax does not interfere with their right of self-government.
>
> *Fort Mojave*, 543 F.2d at 1258.

Most persuasive on the issue of preemption, however, is a close analysis of the present effect of the Crow Tribe's coal tax. As the plaintiffs have indicated in their memoranda to the Court, the Tribe has adopted and had approved a coal severance tax upon coal produced from beneath the Reservation trust lands. No gross proceeds tax has been enacted by the Tribe. At present, the only mining being done is that of coal underlying the ceded strip. By the plaintiffs' own admission the tribal taxing statutes do not affect mining in the ceded area. The simple fact is that the Crow Tribe, although possessing a certain measure of taxing power, has as yet taxed no one, and no one

has as yet been taxed by both the tribe and the State upon production of proceeds from coal. It is therefore apparent that plaintiffs' claim that the Montana taxing statutes here in issue have been preempted by federal statutes as well as the Crow Tribal coal tax is without merit.

D. Enabling Act And Constitutional Claims

Section 4 of the Enabling Act pursuant to which Montana was admitted to the Union provides:

> That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States. . . .
>
> Enabling Act of February 22, 1899, 25 Stat. 676.

The Constitution adopted and ratified by the people of Montana in 1889 pursuant to the Enabling Act recognized and accepted the limitation upon the State's power to tax. Ordinance No. I to the 1889 Constitution of the State of Montana provided:

> Second. That the people inhabiting the said proposed state of Montana, do agree and declare that they forever disclaim all right and title to . . . all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .
>
> Montana Constitution, Ord. I, 2 (1889).

The same disclaimer is expressly reaffirmed by and incorporated in Article I of the Montana Constitution of 1972.

Upon the basis of the disclaimer of jurisdiction appearing in both the Enabling Act and the Constitution, the plaintiffs contend that the State is without authority to enact, let alone assess the taxes contemplated by R.C.M., (1947) §§ 84-1312 through 84-1325. Plain-

tiffs' argument in this connection suffers the same failing, however, as did their argument that the taxes in issue lack congressional authority. Plaintiffs, in arguing that the Montana coal severance tax and Montana coal gross proceeds tax are violative of both the Constitution and Enabling Act of the State, are arguing from the position that the taxes are levied against either the Tribe or tribal trust land. That contention has previously been expressly rejected. Plainly, the taxes in issue are imposed upon the production and income of non-Indian coal mine operators. The taxes levied are levied upon personalty. In distinguishing between taxation of Indians or Indian realty and personalty found upon the reservation in the possession of a third party, the Ninth Circuit stated, in *Truscott* v. *Hurlbut Land and Cattle Co.*, 73 F. 60 (9th Cir. 1896):

> The people inhabiting the proposed state [of Montana] were required by congress to agree, and did agree, as one of the conditions to its admission into the Union, to disclaim any right or title to all lands lying within the limits of the proposed state owned or held by any Indian or Indian tribes, and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and under the absolute jurisdiction and control of congress. The people inhabiting the proposed state were required to make, and did make, as one of the conditions of its admission into the Union, a similar disclaimer in respect to all right and title to the unappropriated public lands lying within its boundaries. Those, too, remained in the absolute jurisdiction and control of congress for all purposes relating to their control or disposition. The state could not tax or incumber such unappropriated public lands, or otherwise interfere with the jurisdiction and control over them reserved by the United States, *but no one, we apprehend, would contend that personal property taken upon them by a third party, whether rightfully or wrongfully, would not be liable to be taxed in the state and county in which it should be found.*
>
> *Truscott*, 73 F. at 64 (emphasis added).

The *Truscott* Court went on further to say that:

> In reserving lands for the exclusive and undisturbed use of these Indians and for others who, with their consent and with that of the United States, should occupy them, it was not the intention of congress to establish an asylum into which persons other than

> the Indians, whether natural or artificial, can take their property, and hold it exempt from its just portion of the taxation necessary for the support of the government which gives it protection.
>
> *Truscott*, 73 F. at 65.

As the taxes in issue are assessed solely against Westmoreland, a non-Indian entity, and are in fact assessed solely against Westmoreland's personalty — severed coal and gross proceeds from coal — it is inconceivable that any infringement upon Indian rights has been worked, or that any abridgement of either the Enabling Act or the Montana Constitution has occurred. Montana has in no way exceeded its sovereign powers in either legislating or assessing the coal severance and gross proceeds from coal taxes. To strike down the taxes in issue would be to extend to Westmoreland an immunity from State law which is antithetical to both the letter and the trend of the law concerning State jurisdiction over Indian reservations. To work such a drastic alteration requires exercise of legislative, and not judicial, discretion. The result sought by plaintiffs is one that Congress, and not the Courts, must give them.

From the foregoing, it is evident that plaintiffs can prove no set of facts in support of any of their four enumerated claims which would entitle them to the requested relief. *Conley* v. *Gibson*, 355 U.S. 41 (1957). As plaintiffs' claims are without basis either in fact or in law, they are insufficient to survive the State of Montana's motion to dismiss. The motion to dismiss the second amended complaint for failure to state a claim is meritorious, and must be granted.

III. MOTION TO DISMISS THE CLAIMS OF THE INDIVIDUALLY NAMED PLAINTIFFS FOR WANT OF SUBJECT MATTER JURISDICTION

By this motion the State seeks to dismiss the claims of the individually named plaintiffs, Horn, Hogan, Yellowtail, and Old Coyote, for want of jurisdiction. The individually named plaintiffs have brought their claims pursuant to 28 U.S.C. §§ 1331 and 1343.

Section 1331 recites that:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum

> or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

The Second Amended Complaint recites, in paragraph 1, that the amount in controversy exceeds, exclusive of interest and costs, $10,000. No allegation appears in the complaint that the amount in controversy as to each plaintiff exceeds the jurisdictional amount of $10,000. It is well settled that in an action in which jurisdiction is invoked pursuant to 28 U.S.C. § 1331, each plaintiff must not only allege but also be able to meet the jurisdictional amount requirement. *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973). It is essential that each of the individual plaintiffs properly plead the amount in controversy prior to this Court's recognizing its jurisdiction. The value of the matter in controversy must be measured not by the importance of the principle involved, but by the monetary value of the right sought to be gained. *Yoder* v. *Assiniboine & Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964). Here, the matter sought to be gained is immunity for lessees of the Tribe from the coal severance and coal gross proceeds taxes. The principal allegation as to value supporting the plaintiffs' claim is that the Tribe, and not the individual plaintiffs, would be in a better bargaining position for the negotiation of coal leases if Montana were enjoined from imposing its taxes upon Crow tribal lessees. The monetary benefits sought here to be gained accrue solely to the Tribe; as such, any right or matter in controversy accruing to the individual plaintiffs is necessarily based upon a theory that each has a right to share in any benefits accruing to the Tribe. It is evident, however, that individual members of the Tribe cannot claim, as a matter of right, any specific portion of tribal benefits for themselves.

> In the absence of legislation to the contrary, the individual Indian has no right as against the tribe to any specific part of the tribal property. It is often said that the individual has only a "prospective right" to future income from tribal property in which he has no present interest. . . . Until the property loses its tribal character and becomes individualized, his right can be no more than this. . . . In the case of tribal funds, he has, ordinarily, no vested right in them until they have been paid over to him or have been set over to his credit. . . .

> Felix Cohen, *Handbook of Federal Indian Law*, 183-184 (1942).

It is evident that the individually named plaintiffs have no economic interest or matter in controversy sufficiently detached from the general economic injury alleged by the Tribe such that they are entitled to invoke this Court's federal question jurisdiction under § 1331. Further, as no specific allegations of amount in controversy appear as to each plaintiff, this Court is without subject matter jurisdiction over the claims of Horn, Hogan, Yellowtail, and Old Coyote under the provisions of 28 U.S.C. § 1343(3). That section provides that:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

Jurisdiction under § 1343(3) does not turn upon satisfaction of a minimum amount-in-controversy requirement. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972).

The defendants argue that 28 U.S.C. § 1341 is a bar to this Court's jurisdiction under § 1343. Section 1341 states:

> The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

The plaintiffs have argued, and correctly so, citing *Confederated Salish and Kootenai Tribes* v. *Moe*, 392 F.Supp. 1297 (D. Mont. 1974), aff'd 425 U.S. 463 (1976), that

> . . . the exception [from the bar of § 1341] applies even where, as here, the United States is not a party plaintiff, if the suit could have been brought by the United States and is in fact brought by parties who could properly be co-plaintiffs with the United States. . . .

Moe, 392 F.Supp. at 1302.

However, the only challenge to the Montana taxes offered by the individual plaintiffs is that the taxes constitute a violation of their civil rights. Although § 1341 does not bar the claims of the Tribe, *Moe, supra,* it bars jurisdiction even when the Court could have accepted jurisdiction pursuant to 42 U.S.C. § 1983 (civil rights violations), 28 U.S.C. §§ 1343 and 1331. *Bland* v. *McHann,* 463 F.2d 21 (5th Cir. 1972), *cert. denied,* 410 U.S. 966 (1973); *Gray* v. *Morgan,* 371 F.2d 172 (7th Cir. 1966), *cert. denied,* 386 U.S. 1033 (1967). The individually named plaintiffs' complaint, as based upon a federal question or alleged violations of their civil rights, does not avoid the jurisdictional prohibition contained in 28 U.S.C. § 1341. *Hickman* v. *Wujick,* 488 F.2d 875 (2nd Cir. 1973). It is evident that the State of Montana's motion to dismiss the claims of the individually named plaintiffs for want of subject matter jurisdiction is well taken.

On the basis of the foregoing,

IT IS ORDERED that the State of Montana's motion to dismiss the Second Amended Complaint for failure to state a claim upon which relief may be granted be, and the same hereby is, granted.

IT IS FURTHER ORDERED that the State of Montana's motion to dismiss the claims of the individually named plaintiffs, Horn, Hogan, Yellowtail, and Old Coyote, for want of subject matter jurisdiction be, and the same hereby is, granted.

The clerk is directed to enter judgment by separate document in accordance with this memorandum opinion and order.

Done and dated this 3rd day of April, 1979.

/s/ James F. Battin
Chief United States District Judge

APPENDIX C

CROW TRIBE OF INDIANS,
Plaintiff-Appellant,

v.

STATE OF MONTANA, and Ramon Dore,
Director, Montana Department of Revenue,
Defendants-Appellees.

No. 79-4321

**United States Court of Appeals,
Ninth Circuit.**

**Argued and Submitted Jan. 14, 1980.
Decided July 13, 1981.**

**Appeal From The United States District
Court For The District Of Montana**

Before TANG, FLETCHER and ALARCON, Circuit Judges.

FLETCHER, Circuit Judge:

In 1975, Montana imposed severance and gross proceeds taxes on all coal mined and sold in Montana, including coal mined by non-Indians from the Crow Indian Reservation and from deposits held in trust for the Crow Tribe of Indians (Tribe). The Tribe sought injunctive and declaratory relief against the imposition of taxes on the production of non-Indian mineral lessees. The district court 469 F.Supp. 154 dismissed the complaint under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted, and the Tribe now appeals. Our jurisdiction is based on 28 U.S.C. § 1291.

[1] We hold that even though the incidence of these taxes falls upon non-Indian lessees, the Tribe has alleged facts that, if proved, would establish that the taxes are preempted by the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1976), and that the taxes infringe upon the Tribe's right ot govern itself. Accordingly, we reverse and remand.

I

[2] Vast deposits of coal underlie both the Crow Reservation proper and an adjacent area known as the "ceded strip." The ceded strip consists of about 1,137,500 acres that were originally part of the reservation. The Crow Tribe ceded its interest in the surface estate of the area to the United States in 1904 in order to open the area to non-Indian entry and settlement, pursuant to the Act of April 27, 1904, ch. 1624 33 Stat. 352. Although surface interests were thereafter conveyed to non-Indians, *see Cady* v. *Morton*, 527 F.2d 786, 789 (9th Cir. 1975), rights to minerals underlying the ceded strip were in large part retained by the United States for the benefit of the Tribe. We held recently that the ceded area is not a part of the reservation. *Little Light* v. *Crist*, ____ F.2d ____ at ____ , No. 79-2714, slip op. at 408 (9th Cir. 1981). Regardless of the status of the ceded strip, however, the underlying minerals are held by the United States Government in trust for the Tribe.

Since 1967, the Secretary of the Interior has actively encouraged the Tribe to develop its coal resources through the granting of prospecting permits and mining leases. The leasing activity has taken place under the aegis of the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1976), and the regulations promulgated under the Act, 25 C.F.R. §§ 171.-1-.30 (1980).

In 1972, Westmoreland Resources, a non-Indian company entered into two mining leases with the Crow Tribe that embraced coal underlying about 31,000 acres of the ceded strip. The Tribe has also granted prospecting permits to and entered into leases with other non-Indian companies. To date, only Westmoreland Resources has actually mined coal under the leases.

In 1975, Montana enacted statutes that impose on coal mine operators a severance tax on each ton of coal produced in the state and a gross proceeds tax on the sale of each ton of coal produced in the state. 4 Mont. Code Ann. §§ 15-35-101 through 15-35-111 and §§ 15-23-701 through 15-23-704 (1979) (formerly Mont.Rev. Code Ann. §§ 84-1312 through 84-1325 (1947)). Westmoreland Resources has been paying Montana's severance and gross proceeds taxes since 1975. Because Westmoreland Resources falls into the

highest statutory classification, that of one who surface mines high-quality coal, it is required to pay a severance tax equal to 30 percent of the value of the coal mined. Since 1975, Westmoreland has paid $27 million in severance taxes and $3 million in gross proceeds taxes. During the same period, Westmoreland has paid about $8 million in royalties to the Tribe under the terms of its leases.

On January 31, 1976, the Tribe enacted its own coal tax code which provides for a severance tax of 25 percent of the value of coal mined by the Tribe's lessees. At present, the tribal severance tax applies only to coal mined on the reservation, and not to coal mined on the ceded strip. [1]

II

The Montana Coal Severance Tax, Mont. Code Ann. §§ 15-35-103, is "imposed on each ton of coal produced in the state." "Produced" means "severed from the earth." Mont. Code Ann. § 15-35-102. The tax is measured by the value of the "contract sales price" of the coal, which is defined as "the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes on production." *Id.* The rate of tax varies from 3 to 30 percent of the value of the coal, depending upon the quality of the coal and whether the mine is a surface or an underground mine. Mont. Code Ann. § 15-35-103. The tax is paid quarterly directly to the Montana Department of Revenue by each coal mine operator. Mont. Code Ann. § 15-35-104.

Montana has made elaborate provision for the disposition of funds gained through the coal severance tax. The major recipient is a special trust fund created by the Montana Constitution. Mont. Const. art IX, § 5. The fund contains only monies collected pursuant to the severance tax. The principal of the fund may only be invaded on a three-fourths vote of the Montana legislature. The legislature may, however, appropriate the interest and income earned by the fund. Twenty-five percent of the coal severance tax monies collected prior to December 31, 1979 were to go directly to the trust fund; 50 percent of the collections after that date go into the fund.

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[1] *See* note 19 *infra*.

The remaining severance tax monies are allocated to a variety of uses. The largest single use is a "local impact and education trust fund account," which is to receive between 26 and 37½ percent of revenues. The remaining revenues go to state equalization aid to public schools, a coal area highway improvement fund, archeological preservation, various cultural projects, park acquisition and management, an alternative energy research fund, the general funds of the counties where the coal is mined, county land planning, and a sinking fund servicing renewable resource development bond accounts. Mont. Code Ann. § 15-35-108.

The Gross Proceeds from Coal Tax is imposed on "each person engaged in mining coal." Mont. Code Ann. § 15-23-701. Each person mining coal must file with the State Department of Revenue an annual report that must include, *inter alia*, a statement of the number of tons of coal extracted, treated, and sold from the mine during the taxable period" and "the gross yield or value in dollars and cents derived from the contract sales price." *Id.* The Department of Revenue transmits to the county assessor of each county in which the coal mines are located the valuation of the gross proceeds of the mine. Mont. Code Ann. § 15-23-702. The county assessor then enters the value on an assessment roll, *id.*, and transmits a tax assessment to the county treasurer, who collects the taxes due from the coal operator. Mont. Code Ann. § 15-23-703.

III

The litigants ask us to make difficult determinations concerning the limits of state power to tax Indians and Indian-related activities. Although the issue before the Supreme Court in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), was the narrow one of whether a state may tax reservation Indians for income earned on the reservation, the Court used the occasion to describe the analytical context in which such questions are to be viewed.

The Court in *McClanahan* stated that, in recent years, "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." 411 U.S. at 172, 93 S.Ct. at 1262. The Court noted, however, that it

would be a vast oversimplification to say that nothing is left of the doctrine of Indian sovereignty. *Id.* at 170, 93 S.Ct. at 1261. The doctrine remains relevant as a "backdrop against which the applicable treaties and federal statutes must be read." *Id.* at 172, 93 S.Ct. at 1262. The Court made the further observation that because the federal treaties and statutes in almost all cases do define the boundaries of federal and state jurisdiction, the extent of federal preemption and residual Indian sovereignty in the absence of federal legislation or treaty is essentially moot. *Id.* at 172 n.8, 93 S.Ct. at 1262 n.8. Finally, the Court in *McClanahan* stated that, if the state action is not preempted by federal legislation or treaty, the state need only satisfy the test laid down in *Williams* v. *Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1958), that state action must not infringe on the rights of reservation Indians to govern themselves. *Id.* at 171-72, 93 S.Ct. at 1261-1262.

[3, 4] Although the Court in *McClanahan* stated that tribal immunity from state taxation does not rest primarily on any inherent tribal sovereignty, we note that remnants of the sovereignty rationale are implicit in the holding of *McClanahan* in the form of certain presumptions. Direct state taxation of tribal property or the income of reservation Indians is presumed to be preempted, absent express Congressional authorization. *Bryan* v. *Itasca County*, 426 U.S. 373, 376-77, 96 S.Ct. 2102, 2105-2106, 48 L.Ed.2d 710 (1976); *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-81, 96 S.Ct. 1634, 1642-1645, 48 L.Ed.2d 96 (1976); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 114 (1973). In contrast, state taxation of non-Indian activities on the reservation can proceed without express congressional authorization, even if the taxation affects Indians in some way. *See Washington* v. *Confederated Tribes of Colville*, 447 U.S. 134, 148, 100 S.Ct. 2069, 2078, 65 L.Ed.2d 10 (1980). It is enough that such taxation does not conflict with federal statutes or treaties or interfere to an impermissible extent with the ability of the tribe to govern itself.

[5-7] In *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), the Supreme Court discussed the principles of preemption to be applied in a case such as this. The Court noted that the test of whether a state law concerning Indians has been preempted is different from the test used to find

federal preemption in other contexts. *Id.* at 448 U.S. at 140, 100 S.Ct. at 2582. The tradition of Indian independence from state control and the broad federal policies to the same end (the "backdrop" of Indian sovereignty described in *McClanahan*) color the way in which we view federal statutes and regulations affecting Indians. *Id.* The Court found that Congress intended broad preemptive effect to be accorded federal statutes and regulations when the state action in question threatens the "firm federal policy of promoting tribal self-sufficiency and economic development." *Id. See generally* D. Getches, D. Rosenfelt, & C. Wilkinson, *Cases and Materials on Federal Indian Law*, 295-99 (1979). No express congressional statement of preemptive intent is required; it is enough that the state law conflicts with the purpose or operation of a federal statute, regulation, or policy.[2] On the other hand, legitimate interests of the state must be considered, and the ultimate result where the conduct of non-Indians on the reservation is involved depends on "a particularized inquiry into the nature of the State, Federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. at 149, 100 S.Ct. at 2586.

[8-11] The accommodation of state and tribal interests is also central to the analysis of whether a state law infringes upon the right of reservation Indians to "make their own laws and be ruled by them." *Washington* v. *Confederated Tribes of Colville*, 447 U.S. 134, 156, 100 S.Ct. 2069, 2083, 65 L.Ed.2d 10 (1980) (quoting *Williams* v. *Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 270, 3 L.Ed.2d 251 (1959)). The self-government doctrine differs from the preemption analysis in that it specifically prohibits state action that impairs the ability of a tribe to exercise traditional governmental functions such as zoning, *Santa Rosa Band of Indians* v. *Kings County*, 532 F.2d 655, 663-64 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 731, 50 L.Ed.2d 748 (1977); vehicle registration, *Red Lake Band of Chippewa Indians* v. *Minnesota*, 311 Minn. 241, 248 N.W.2d 722 (1976),

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[2] Of course, state law will be preempted where Congress expressly so provides, or where the federal regulation is of such breadth that it occupies the field, leaving no room for state involvement.

or the exercise of general civil jurisdiction over the members of the tribe, *Fisher* v. *District Court*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976); *Littell* v. *Nakai*, 344 F.2d 486 (9th Cir. 1965), *cert. denied*, 382 U.S. 986, 86 S.Ct. 531, 15 L.Ed.2d 474 (1966); *White* v. *Califano*, 581 F.2d 697 (8th Cir. 1978); *California* v. *Quechan Tribe*, 424 F.Supp. 969 (S.D.Cal. 1977), *vacated on other grounds*, 595 F.2d 1153 (9th Cir. 1979) (tribe's sovereign immunity barred suit); *United States ex re. Rollingson* v. *Blackfeet Tribal Court*, 244 F.Supp. 474 (D.Mont. 1965). *See also Arizona ex rel. Merrill* v. *Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003, 90 S.Ct. 551, 24 L.Ed.2d 494 (1970) (state has no authority to extradite Indians living on reservation). At base, however, the right of tribal self-government is a federal policy established by and subject to the will of Congress. Although self-government is related to federal preemption in the sense that both depend on congressional action and in the sense that preemption is considered in the context of the deeply ingrained traditional notions of self-government, the self-government doctrine is an independent barrier to state regulation. *See White Mountain Apache Tribe* v. *Bracker*, 448 U.S. at 140, 100 S.Ct. at 2582.

IV

The Tribe initially argues that the incidence of Montana's taxes is on the Tribe. The tax is invalid, the Tribe contends, because Congress has not authorized the direct taxation of tribal mineral holdings, as required by the Supreme Court's rulings in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270 36 L.Ed.2d 114 (1973), and *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).

[12] This court must look to the operation of the taxing statutes to determine which party the Montana legislature intended to be liable for the tax. We find that the incidence of these taxes is on the non-Indian mineral lessee. Neither of the taxes is collected from the owner of the mineral rights *in situ* (unless the owner also happens to be the producer),[3] and the tax is not required by law to be passed on to

[3] The Tribe has not alleged that it has mined any coal itself or that it has paid any taxes directly to the State of Montana.

the owner or to any other party. *See American Oil Co.* v. *Neill*, 380 U.S. 451, 455-56, 85 S.Ct. 1130, 1133-1134, 14 L.Ed.2d 1 (1965); *First Agricultural Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 346-47, 88 S.Ct. 2173, 2177-2178, 20 L.Ed.2d 1138 (1968); *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 99, 62 S.Ct. 1, 3, 86 L.Ed. 65 (1941). Nor is the Tribe subject to any reporting requirements in connection with the tax. Furthermore, we note that the Montana Supreme Court has held that the severance tax is levied on the producer, and that the taxable event is the act of severance. *Commonwealth Edison Co.* v. *Montana*, 615 P.2d 847, 850, 857 (Mont. 1980), *prob. juris. noted*, ____ U.S. ____ , 101 S.Ct. 607, 66 L.Ed.2d 494 (1980) (No. 80-581). The Tribe is not obligated to pay the taxes, and it cannot be held liable for deficiencies.[4]

[13] The extent to which the economic burden of the tax is passed on to the Tribe in the form of decreased royalties is not relevant to the limited inquiry we make here to determine the legal incidence of the tax. *Moe* v. *Confederated Salis & Kootenai Tribes*, 425 U.S. 463, 481-82, 96 S.Ct. 1634, 1645-1646, 48 L.Ed.2d 96 (1976); *Fort Mojave Tribe* v. *County of San Bernardino*, 543 F.2d 1253, 1255 n.2, 1256 (9th Cir. 1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1678, 52 L.Ed.2d 377 (1977); *Agua Caliente Band of Mission Indians* v. *County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972); *Mescalero Tribe* v. *O'Cheskey*, 625 F.2d 967, 970 (10th Cir. 1980). *See also United States* v. *County of Fresno*, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977); *Gurley* v. *Rhoden*, 421 U.S. 200, 204, 207, 95 S.Ct. 1605, 1608, 1610, 44 L.Ed.2d 110 (1975); *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361, 382 n.12, 84 S.Ct. 378, 390 n.12, 11 L.Ed.2d 389 (1964); *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U.S. 77, 80, 58 S.Ct. 436, 438, 82 L.Ed. 673 (1938); *Lash's Prods. Co.* v. *United States*, 278 U.S. 175, 49 S.Ct. 100, 73 L.Ed. 251 (1929).

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[4] The coal mines themselves, however, are subject to the imposition of liens in the event the taxes are not paid. Mont. Code Ann. § 15-23-704. We are not called upon to express a view on the validity of this provision as applied to Indian coal *in situ*.

[14] The Tribe argues that the ultimate intent of the Montana legislature was to tax the coal itself and thereby raise revenue, regulate the rate of production, and preserve the value of the natural resource. Our inquiry into the legislature's intent in this regard is limited to ascertaining the legal obligations imposed upon the concerned parties, however, and does not extend to divining the legislature's "true" economic object. *Gurley* v. *Rhoden*, 421 U.S. 200, 204-07, 95 S.Ct. 1605, 1608-1610, 44 L.Ed.2d 404 (1975); *American Oil Co.* v. *Neill*, 380 U.S. 451, 455-57, 85 S.Ct. 1130, 1133-1134, 14 L.Ed.2d 1 (1965); *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 99, 62 S.Ct. 1, 3, 86 L.Ed. 65 (1941); *Alabama* v. *King & Boozer*, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941). But *see United States* v. *City of Leavenworth*, 443 F.Supp. 274, 281-82 (D.Kan. 1977).[5]

V

[15]The Tribe argues that the Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g (1976),[6] and the regulations promulgated

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[5] The Tribe also argues that Montana's taxes violate section 4 of the Enabling Act pursuant to which Montana was admitted to the Union. Section 4 provides:

> Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.. . .

Act of February 22, 1889, ch. 180 § 4, 25 Stat. 676. This disclaimer was adopted and ratified in Montana's original constitution, Mont. Const. Ord. I, 2 (1889), and in the state's new constitution. Mont. Const. art. I (1972).

Because we find that the incidence of these taxes falls on the non-Indian mineral lessee, we see no conflict between the taxes and the Enabling Act *Truscott* v. *Hurlbut Land & Cattle Co.*, 73 F. 60 (9th Cir. 1896).

[6] The 1938 Act originally excluded the crow Reservation from its coverage. 25 U.S.C. § 396f. Until 1959, mineral leasing on the Crow Reservation was governed by section 6 of the Crow Allotment Act of 1920, ch. 224 § 6, 41 Stat. 751, as amended by the Act of May 26, 1926, ch. 403, 44 Stat. 658.

thereunder, 25 C.F.R. §§ 171.1-.30 (1980)[7] sweep so broadly through the area of Indian mineral leasing that there is no room for state involvement.[8] *See Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *Central Machinery Co.* v. *Arizona State Tax Comm'n*, 448 U.S. 160, 100 S.Ct. 2592, 2599, 65 L.Ed.2d 684 (1980). We need not view preemption as so comprehensive in this case because we find that the Tribe's allegations, if not controverted, would establish that the challenged Montana taxes directly and substantially thwart the policies underlying the Mineral Leasing Act of 1938.

[16] The 1938 Act[9] was designed to achieve three goals. *See* H.R.Rep.No. 1872, 75th Cong., 3d Sess. at 1-3 (1938); S.Rep.No. 985, 75th Cong., 1st Sess. 2-3 (1937); United States Dep't of Interior, *Federal Indian Law* 695 n.45 (1958). First, the Act sought to

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In 1959, Congress amended section 6 of the Crow Allotment Act of 1920 to provide that mineral leases on Crow lands were to be governed by provisions of the 1938 Act. Act of September 16, 1959, Pub. L. No. 86-283, 73 Stat. 565. *See also* Act of May 17, 1968, Pub. L. No. 90-308, 82 Stat. 123.

[7] See also 25 C.F.R. §§ 173.1-.29 (1980).

[8] The Tribe also argues that the taxes are preempted by the Tribe's enactment of its own coal severance tax on the mining of coal underlying the reservation and ceded strip. Absent a demonstration of congressional intent to delegate authority to the Tribe to preempt Montana's taxing statutes, the tribal ordinances carry no such preemptive effect.

The Tribe will have an opportunity to demonstrate on remand that Congress intended to delegate such regulatory and preemptive authority to the Tribe, and that there is a "direct conflict between state and tribal schemes." *Washington* v. *Confederated Tribes of Colville*, 447 U.S. 134, 156, 100 S.Ct. 2069, 2083, 65 L.Ed.2d 10. We note in this regard that 30 U.S.C. § 1300(a) (Supp.I 1977) indicates that Congress is contemplating a delegation to Indian tribes of some authority over surface mining on Indian lands. See note 17 *infra*.

[9] The 1938 Act provides that an Indian tribe may lease its lands for mining purposes with the approval of the Secretary of the Interior. 25 U.S.C. § 396a. Section 396b provides for the sale of oil and gas mining leases under regulations to be prescribed by the Secretary. The Secretary is authorized to reject all bids and readvertise leases when in the Secretary's judgment that

achieve uniformity in the law governing mineral leases on Indian lands. Prior law had been a statutory hodgepodge that imposed different requirements for mineral leases on different Indian lands.[10] Second, the 1938 Act was designed to help achieve the broad policy of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), that tribal governments be revitalized. In the mineral leasing context, this meant giving tribal governments control over decisions to lease their lands and over lease conditions, subject to approval of the Secretary of Interior, where before the responsibility for such

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course would be in the Indians' best interests. With the Indians' consent, a lease may be privately negotiated. Section 396b also safeguards the rights of tribes organized under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1976), to enter into mining leases in accordance with the provisions of that Act and with their tribal constitutions and corporate charters. Other sections specify the type of bond to be furnished by the lessees and authorize the Secretary to promulgate regulations. 25 U.S.C. §§ 396c, 396d.

The regulations promulgated by the Secretary under authority of the 1938 Act cover many aspects of mineral leasing between tribes and non-Indian lessees, including the procedures for acquiring mineral leases, minimum rates for rentals and royalties and the manner in which payments are to be made, penalties for failure to comply with the terms of leases, information to be supplied by lessees, acreage limitations, inspections of lessees' records by Indian lessors or by Department of Interior officials, and cancellation of leases. 25 C.F.R. §§ 171.1-.30 (1980); *see also* 25 C.F.R. 66 173.-1-.29 (1980).

[10] The 1938 Act achieved uniformity by including all tribally-owned (unallotted) lands, on or off the reservation, within its ambit, and by repealing "[a]ll Act [sic] or parts of Acts inconsistent herewith." Section 7 of the Act, 52 Stat. at 348 (not codified but set out at 25 U.S.C. § 396a note). The latter provision probably repealed the prior leasing statutes. *See* 84 Interior Dec. 905 (1977); *cf. Merrion* v. *Jicarilla Apache tribe*, 617 F.2d 537 (10th Cir. 1980), *cert. granted*, ____ U.S. ____ , 101 S.Ct. 71, 66 L.Ed.2d 21 (1981) (No.80-11) (reserving the question). Since 1938, the Interior Department has operated under the 1938 Act with regard to Indian mineral leases. *See* 84 Interior Dec. 905 (1977).

decisions was lodged in large part only with the Secretary. [11] Third, the 1938 Act was intended to encourage tribal economic development, an important objective of the Indian Reorganization Act of 1934. Prior to the 1938 Act, the leasing of Indian lands for mining purposes was governed by mining laws applicable to public lands generally. Technical requirements and complicated procedures under these laws had prevented the leasing of much of the Indians' land, thus depriving them of considerable revenue. *See* H.R.Rep.No. 1872, 75th Cong., 3d Sess. at 2 (1938); S.Rep. No. 985, 75th Cong., 1st Sess. at 2 (1937); 79 Cong.Rec. 7815 (1938) (remarks of Sen. Thomas), *Id.* at 8307-08 (remarks of Sen. Thomas). The 1938 Act provided that the land was to be leased by the Indians on terms restricted only by regulations to be adopted by the Secretary pursuant to the Act.

[17] If the allegations of the complaint are sustained at trial, the Montana Coal Severance Tax will conflict with the purposes of the 1938 Act in several respects. Most prominently, the magnitude of the tax will prevent the Tribe from receiving a large portion of the economic benefits of its coal. The Montana legislature predicated its tax upon a finding that strip coal

> is in sufficient demand that at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes. . . .

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[11] Early Indian mineral leasing legisiation placed varying amounts of control over leasing decisions with the Indian agent in charge of the reservation, 25 U.S.C. § 397 (1976), and with the Secretary of the Interior. 25 U.S.C. § 399 (1976). The latter statute contained no provision for Indian consent to the leases and permitted the Secretary to prescribe reasonable terms and conditions. Other statutes provided that Congress could appropriate lease revenues for various purposes. 25 U.S.C. §§ 400a, 398b.

Tribal control over resources was further diluted by holdings that the secretary had no discretion in the granting of leases once land had been declared open for prospecting. In some cases, leases were granted over tribal objections. H.R.Rep.No.1872, 75th Cong., 3d Sess. at 2 (1938); S.Rep.No.985, 75th Cong., 1st Sess. at 2 (1937).

Mont.Code Ann. § 15-35-101(1)(e). [12] By setting the severance tax rate at 30 percent of value, Montana made plain its intention to appropriate most of the economic rent. The substantial adverse effect on the Tribe's potential revenues is obvious when the state takes such a large portion of this economic surplus. [13] The Tribe has alleged that, to date, Montana has realized $27 million from its severance tax while the Tribe has received only $8 million in royalties. [14]

[18, 19] Some economic impact on the Tribe can be justified if the state's interests in imposing the tax are legitimate. Of course, revenue raising to support government is a proper purpose behind most taxes. Montana's severance tax, however, has an unusual and additional purpose going far beyond revenue raising to support

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[12] "Economic rent" is the amount of revenue that can be extracted from an activity, here in the form of royalties and taxes, without significantly discouraging production.

[13] Montana argues that the Crow Tribe has not itself paid a penny in severance taxes, that Westmoreland is the only party that has been so burdened, and that the Tribe has therefore received everything to which it was entitled under the terms of the Westmoreland lease. Thus, the state contends, the Tribe has suffered no economic hardship from the tax.

The argument is unconvincing for several reasons. First, the Tribe's complaint asks for a declaration that the tax will not apply to production under future leases that the Tribe wishes to enter into. The Tribe has alleged that the tax will reduce the royalties future lessees would be willing to pay. In this regard, we note that Shell Oil Company has asserted in its *amicus* brief that Montana's taxes severely reduce the compensation Shell can offer the Tribe in its ongoing coal lease negotiations. Furthermore, the Tribe alleges that the royalties under the Westmoreland lease are subject to renegotiation every ten years, and that the Tribe could negotiate for a greater portion of the coal's value if the severance tax were declared to be inapplicable.

As to the taxes already paid by Westmoreland, however, it is true that the tribe has not paid any of the taxes and is apparently not entitled to any refund if the tax statutes are declared invalid.

[14] While none of the $27 million came out of the Crow Tribe's pocket, *see* note 13 *supra*, the disparity between the revenues of the state and those of the Tribe arguably indicates the extent to which the state is attempting to secure a large share of the economic surplus.

government. The legislative subcommittee that gave birth to Montana's system of coal taxation described the severance tax device as follows:

> Severance Taxes are levied upon a state's natural resources for several reasons. One, obviously, is the need for revenue. Another is that a state's natural resources, are nonrenewable. When the resources are mined, the state loses a valuable asset forever. The levying of a severance tax is one manner by which the state can share in the profits associated with the extraction of a mineral asset. . . .

Subcommiteee on Fossil Fuel Taxation, Montana Legislative Council, *Fossil Fuel Taxation* 3 (Dec. 1974 Interim Study). This statement demonstrates a purpose to keep the value represented by the state's nonrenewable assets intact, for use by Montanans in the future. This purpose was implemented through the creation of the special trust fund under Article IX, Section 5 of the Montana Constitution. As discussed above, the fund is the major recipient of severance tax monies.[15] While the state may have an interest in perpetuating the value of mineral wealth subject to its general civil jurisdiction, it has no such legitimate interest in appropriating Indian mineral wealth.

[20] Furthermore, the severance tax is more than a revenue-raising device. It has regulatory purposes as well. The Subcommittee on Fossil Fuel Taxation, in describing the purposes behind severance taxes, stated

> A severance tax . . . can help discourage resource waste; a basic assumption of severance taxation is that future generations will need mineral resources similar to those used today. By being production [sic], a severance tax can encourage producers to manage their operations efficiently.

Subcommittee on Fossil Fuel Taxation, Montana Legislative Council, *Fossil Fuel Taxation* 3-4 (Dec. 1974 Interim Study). This coal is not the state's to regulate, and assertion of such authority diminishes the Tribe's own power to regulate. Such state action conflicts with the 1938 Act's purpose of allowing tribes to control the development of their mineral resources.

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[15] See discussion at pp. 3522-3523 *supra*.

Montana asserts other legitimate interests, however, that if substantiated at trial may ultimately affect the outcome of the litigation. It argues that western states are burdened with the phenomenon of the "energy boomtown." Large-scale mining operations in rural areas place great strains on state and local governments to provide roads, schools, utilities, fire and police protection, recreation and health facilities, and other more subtle benefits such as a trained work force and an organized government and system of laws. Coal may be mined on the reservation or ceded strip, but the coal miner will undoubtedly be using state services and burdening state government. In addition, mining on the reservation or ceded strip could cause significant environmental effects elsewhere, such as ground and surface water pollution, air pollution, and solid waste disposal problems. The state may encounter substantial costs in dealing with these effects.

On balance, we suspect that these legitimate interests will not be shown to be enough to save the severance tax from fatal conflict with the purposes behind the 1938 Act. A tax carefully tailored to effectuate the state's legitimate interests might survive. *Washington* v. *Confederated Tribes of Colville*, 447 U.S. 134, 163, 100 S.Ct. 2069, 2085, 65 L.Ed.2d 10 (1980).

[21, 22] One further complexity deserves mention. Westmoreland is mining coal on the ceded strip. As discussed at pp. 3521-3522 *supra*, the ceded strip has been severed from the reservation proper. [16] That being the case, the balance of responsibilities between state and tribal governments may be altered to some degree. The Supreme Court has recognized that the policy of protecting Indian sovereignty involves a "significant geographical component . . . which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 148, 100 S.Ct. 2578, 2586.

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[16] Regardless of the reservation status of the surface of the ceded area, we think it clear that the Mineral Leasing act of 1938 is applicable to the leasing of the underlying coal. See discussion at pp. 3521-3522 *supra*.

Although the non-Indian land status of the surface of the ceded strip might make a difference if the state were attempting to raise revenue to implement its legitimate regulatory responsibilities on the surface, the state has not designed its tax to meet those needs. Instead, it appears to have attempted to appropriate a portion of the value of tribal resources that has no relationship to the services, if any, it provides. [17] Inquiry in this regard can be had on remand.

[23] As for the Gross Proceeds from Coal Tax, the record is insufficient at this stage of the proceedings to reveal what state, tribal, and federal interests may be involved, or to indicate whether the tax's impact is sufficient to thwart the policies of the 1938 Act. We find that the Tribe has made allegations sufficient to raise the possibility that the tax may conflict with the 1938 Act.

VI

[24] The Tribe argues that Montana's taxes impermissibly infringe on the Tribe's ability to govern itself, and that the taxes therefore violate the principle articulated in *Williams* v. *Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), that, "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220, 79 S.Ct. at 271. In *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), The Supreme Court construed the *Williams* v. *Lee* test:

> [C]ases applying the *Williams* test have dealt principally with situations involving non-Indians. . . . In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to

[17] We note that Congress has directed the Secretary of Interior to submit proposed legislation allowing tribes to assume regulatory authority under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201-1328 (Supp. I 1977), over surface mining on "Indian lands." 30 U.S.C. § 1300(a). "Indian lands" are defined as "all lands, including mineral interests, within the exterior boundaries of any Federal Indian reservation . . . and all lands including mineral interests held in trust for or supervised by an Indian tribe." 30 U.S.C. § 1291(9).

> resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.

411 U.S. at 179, 93 S.Ct. at 1266. We read *McClanahan* to require the reviewing court to balance the importance of the state interest in asserting the particular authority against the impact on the Tribe's ability to govern itself effectively. *Fort Mojave Tribe* v. *County of San Bernardino*, 543 F.2d 1253, 1257-58 (9th Cir. 1976).

[25] The Tribe makes two arguments with respect to the self-government test. First, it argues that the state tax infringes on the Tribe's ability to levy its own severance tax. [18] Second, the Tribe contends that the state tax deprives it of the ability to negotiate with its lessees for higher royalties and thereby restricts its ability to generate revenues needed for tribal programs.

[26] With respect to the tribal tax argument, we think that even if the state and tribal taxes were imposed on the same activity, [19] that fact alone would not preclude the state from imposing its tax. Each taxing body is free to impose its tax, since neither tax by its terms

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[18] It is now clear that, generally speaking, tribes retain the power to tax transactions that occur on trust lands and that significantly involve a tribe or its members. *Washington* v. *Confederated Tribes of Colville*, (1980) 447 U.S. 134, 152, 100 S.Ct. 2069, 2080, 65 L.Ed.2d 10.

[19] The Tribe's initial attempt to tax its lessees' coal production was partially frustrated by the Secretary of the Interior's refusal to sanction the Tribe's tax ordinances insofar as they applied to coal production on the ceded strip. The Secretary's refusal was based on the Tribe's constitution, which disclaimed authority over lands outside the reservation boundaries. The Tribe has since amended its constitution to allow it to tax mining activity on the ceded strip, and the tribal tax is once again being considered by the Secretary. The Secretary approved the tribal tax ordinance as it applied to the reservation proper.

Although it is true that, as far as Westmoreland's activities on the ceded strip are concerned, Montana's taxes and the tribal taxes do not presently conflict, the issue is nevertheless before us because the tribe has sought declaratory relief with regard to future mining operations on the reservation proper.

precludes the other. *Washington* v. *Confederated Tribes of Colville*, 447 U.S. 134, 159, 100 S.Ct. 2069, 2084, 65 L.Ed.2d 10 (1980). As a practical matter, however, it is true that Montana's tax may force the Tribe to choose between imposing its tax, thereby discouraging coal mining, or foregoing tax revenues.

[27] In our view, the Tribe's impairment-of-tribal-tax argument raises the same concerns as the more generalized argument that the tax infringes on self-government by preventing the Tribe from negotiating for higher royalties. Tribal economic enterprise is unique in that a tribe often engages in economic activity while simultaneously exercising more traditional governmental functions, such as taxation, with respect to the same activity. As a result, a tribe may obtain revenues either by manipulating the price of the goods it sells or by taxing its trading partners, where the tribe has taxing power. Which method a tribe chooses should be a matter of economic indifference to the parties, at least at the outset of the transaction.[20] The effect on tribal self-government is the same whether the state tax is seen as impairing the tribe's ability to negotiate for higher royalties or as leaving no excess value for the Tribe to tax. Therefore, we give no special force to the Tribe's impairment-of-tribal-tax argument and view the central problem as that of the state's depriving the Tribe of potential revenues.

The Tribe has alleged that the imposition, assessment, and collection of Montana's taxes "severely impaired the ability of the sovereign Crow Tribe to serve its people through its various programs and governmental services, including but not limited to its vitally important land repurchase program, its tribal cultural and historical program, its tribal educational program and its reservation maintenance services." For the purpose of considering a motion for dismissal, we accept as true the allegation that the economic impact of Montana's taxes on tribal government is severe.

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[20] The form in which the Tribe gets paid for the resource could be very significant if its taxing power is not limited by contract. If the Tribe is not bound, it would be able to adjust its tax rate to changing economic conditions. In theory, this would allow it always to extract the maximum economic rent from the good or service without the necessity of renegotiating its royalty agreements.

[28] Tribal economic activity, while perhaps providing the wherewithal for tribal governments to sustain themselves, is at best indirectly linked to the effectiveness of tribal government. It is clear that a state tax is not invalid merely because it erodes a tribe's revenues, even when the tax substantially impairs the tribal government's ability to sustain itself and its programs. *Washington* v. *Confederated Tribes of Colville*, 447 U.S. 134, 152-156, 100 S.Ct. 2069, 2080-2083, 65 L.Ed.2d 10 (1980).

In Washington v. *Confederated Tribes of Colville*, 447 U.S. at 2083, however, the Supreme Court impliedly recognized that a state's power to tax may be limited when such taxes adversely affect tribal revenues arising from certain goods and services. The Court, in the course of holding that the state could tax on-reservation sales of cigarettes by Indians to non-Indians, noted that "the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest," 447 U.S. at 152, 100 S.Ct. at 2083. The Court further stated:

> The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other. While the Tribes do have an interest in raising revenues for essential governmental programs, *that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services*. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

447 U.S. at 156-157, 100 S.Ct. at 2083 (citation omitted) (emphasis supplied).

In this case, the revenues sought to be taxed by Montana may ultimately be traced to the Tribe's mineral resources, a component of the reservation land itself. This is not a case where the tribe is simply marketing a tax exemption, as where tribes seek to sell tax-free cigarettes to non-Indians. Any substantial incursion into the revenues

obtained from the sale of the Indians' land-based wealth cuts to the heart of the Tribe's ability to sustain itself.

As we have discussed, the Montana legislature has made clear its intention to appropriate a large portion of the surplus economic value of this coal. A major purpose of the tax is to establish a fund that would keep the value of the coal for future generations of Montanans. To the extent that this tax is not related to the actual governmental costs associated with the mining of the Indian coal, *see Washington* v. *Confederated Tribes of Colville*, 447 U.S. at 163, 100 S.Ct. at 2086, the state's interest in acquiring revenues is weak in comparison with the Tribe's right to the bounty from its own land.

We find that the Tribe's complaint adequately states a claim that the Montana taxes infringe on its right to govern itself. To support the claim at trial, the Tribe must show that the taxes substantially affect its ability to offer governmental services or its ability to regulate the development of tribal resources, and that the balance of state and tribal interests renders the state's assertion of taxing authority unreasonable.

Reversed and remanded for proceedings consistent with this opinion.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4321

CROW TRIBE OF INDIANS,

Appellant,

v.

STATE OF MONTANA, and RAMON DORE,
Director, Montana Department of Revenue,

Appellees.

FILED
JAN 5 1982
CLERK, U.S. COURT OF APPEALS

ORDER

Before: TANG, FLETCHER and ALARCON, Circuit Judges.

The opinion filed July 13, 1981 is amended as follows: The following footnotes are added:

4a footnotes the sentence on page 3526, left hand column, ending on line six with the word "tax":

> "4a The tax incidence on the Tribe's royalty interest was not at issue and was not reached by the court."

15a footnotes the sentence on page 3530, left-hand column ending on the bottom line with the citation to *Washington* v. *Confederated Tribes of Colville*, 447 U.S. 134, 163, 100 S.Ct. 2069, 2085, 65 L.Ed. 2d 10 (1980):

> "15a Appellees, in their petition for rehearing call to our attention *Commonwealth Edison Co.* v. *Montana*, 49 U.S.L.W. 4957 (July 2, 1981). In that case, in the context of a challenge to the Montana coal severance tax as a burden on interstate commerce, the Court upheld the tax against the challenge that it is not

> fairly related to the services provided by the state. The Court stated that wide latitude is afforded the states under the Due Process Clause in imposing taxes upon particular activities. It went on to note that no direct benefit need be shown to the class or individuals taxed, and that this latitude afforded the states is not changed merely because the taxed activity has some connection to interstate commerce. Completely different considerations are implicated in the case before us. Our task is to determine the limits of state power to tax Indian tribes, Indian-related activities and Indian trust property. Different congressional acts are at issue. Congressional policy with respect to Indian tribes is involved here, not the constitutionality of the tax. We do not find *Commonwealth Edison* to control this case as suggested by appellees."

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the proposal to amend the opinion, and of the suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX E

THE MONTANA GROSS PROCEEDS FROM COAL TAX, §§ 15-73-701-704, M.C.A.:

15-23-701. Reporting gross yield from coal. Each person engaged in mining coal must, on or before March 31 each year, file with the department of revenue a statement of the gross yield from each coal mine owned or worked by such person in the preceding calendar year and the value thereof. The statement shall be in the form prescribed by the department, which may be coordinated with the form used under 15-35-104 and must be verified by an officer of the firm. The statement shall include:

(1) the name and address of the owner or lessee or operator of the mine;

(2) the location of the mine;

(3) the tons of coal extracted, treated, and sold from the mine during the taxable period;

(4) the gross yield or value in dollars and cents derived from the contract sales price.

History: En. 84-1320 by Sec. 9, Ch. 525, L. 1975; amd. Sec. 3, Ch. 156, L. 1977; R.C.M. 1947, 84-1320.

15-23-702. Transmission of gross proceeds to county assessor. On or before July 1 each year, the department shall transmit to the county assessor of each county in which coal mines are situated the valuation of the gross proceeds of such mines for the purpose of taxation, as the same have been determined by the department. The county assessor shall immediately enter the same upon a suitable assessment roll, the form of which shall be prescribed by the department.

History: En. 84-1321 by Sec. 10, Ch. 525, L. 1975; R.C.M. 1947, 84-1321.

15-23-703. Taxation of gross proceeds. The county assessor shall prepare from the reported gross proceeds from coal a tax roll which he shall transmit to the county treasurer on or before September 15 each

year. The county treasurer shall proceed to give full notice thereof to each coal producer and to collect the taxes due within 60 days after mailing.

History: En. 84-1322 by Sec. 11, Ch. 525, L. 1975; R.C.M. 1947, 84-1322.

15-23-704. Lien of tax — enforcement of payment. The tax on gross proceeds from coal shall be levied as taxes on other forms of property, and this tax and the severance tax on coal production are each a lien upon the coal mine and a prior lien upon all personal property and improvements used to produce the coal. These taxes may be collected by the seizure and sale of the personal property on which the tax is a lien as provided under 15-16-113 and chapter 17, part 9, or by suit under 15-16-501 and 15-16-502.

History: En. 84-1323 by Sec. 12, Ch. 525, L. 1975; R.C.M. 1947, 84-1323.

APPENDIX F

THE MONTANA COAL SEVERANCE TAX, §§ 15-35-101 — 15-35-111 PROVIDES:

15-35-101. Legislative findings and declarations of purpose. (1) The legislature finds that while coal is extracted from the earth like metal minerals, there are differences between coal and metal minerals such that they should be classified in different categories for taxation purposes. The legislature finds that while coal can be utilized like petroleum products, there are differences between coal and petroleum such that they should be classified in different categories for taxation purposes. The legislature further finds that:

(a) coal is the only natural mineral which can supply energy while being easily found in abundance in Montana;

(b) coal is the only mineral which is so often marketed through sales contracts of many years' duration;

(c) coal, unlike most minerals, varied widely in composition and consequent value when marketed;

(d) coal in Montana is subject to regional and national demands for development which could effect the economy and environment of a larger portion of the state than any other mineral development has done;

(e) coal in Montana, when subbituminous and recoverable by strip mining, is in sufficient demand that at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes;

(f) coal in the lignite form is in less demend and producers of lignite are able to pay lesser amounts of royalty and production tax than producers of subbituminous can pay;

(g) coal produced in underground mines has higher production costs and underground producers are able to pay lesser amounts of royalty and production tax than strip-mine producers can pay;

(h) coal production in Montana has been subject to an uncoordinated array of taxes which overlap one another and yield revenue in an inconsistent and unpredictable manner.

(2) The legislature declares that the purposes of this chapter are to:

(a) allow the severance taxes on coal production to remain a constant percentage of the price of coal;

(b) stabilize the flow of tax revenue from coal mines to local governments through the property taxation system;

(c) simplify the structure of coal taxation in Montana, reducing tax overlap and improving the predictability of tax projections; and

(d) accomplish the foregoing purposes by establishing categories of taxation which recognize the unique character of coal as well as the variations found within the coal industry.

History: En. 84-1312 by Sec. 1, Ch. 525, L. 1975; R.C.M. 1947, 84-1312.

15-35-102. Definitions. As used in this chapter, the following definitions apply:

(1) "Contract sales price" means either the price of coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production, or a price imputed by the department under 15-35-107.

(2) "Department" means the department of revenue.

(3) "Energy conversion process: includes any process by which coal in the solid state is transformed into slurry, gas, electric energy, or any other form of energy.

(4) "Produced" means severed from the earth.

(5) "Strip mining" or "surface mining" is defined in 84-4-203.

(6) "Taxes paid on production" includes any tax paid to the federal, state, or local governments upon the quantity of coal produced as a function of either the volume or the value of production and does not include any tax upon the value of mining equipment, machinery, or buildings and lands, any tax upon a person's net income derived in whole or part from the sale of coal, or any license fee.

(7) "Ton" means 2,000 pounds.

(8) "Underground mining" means a coal mining method utilizing shafts and tunnels and as further defined in 84-4-203.

History: En. 84-1313 by Sec. 2, Ch. 525, L. 1975; amd. Sec. 1, Ch. 156, L. 1977; R.C.M. 1947, 84-1313.

15-35-103. Severance tax — rates imposed — exemptions. (1) A severance tax is imposed on each ton of coal produced in the state in accordance with the following schedule:

Heating quality (Btu per pound of coal):	Surface Mining	Underground Mining
Under 7,000	12 cents or 20% of value	5 cents or 3% of value
7,000-8000	22 cents or 30% of value	8 cents or 4% of value
8,000-9,000	34 cents or 30% of value	10 cents or 4% of value
Over 9,000	40 cents or 30% of value	12 cents or 4% of value

"Value" means the contract sales price.

(2) The formula which yields the greater amount of tax in a particular case shall be used at each point on this schedule.

(3) A person is not liable for any severance tax upon 20,000 tons of the coal he produces in a calendar year.

History: En. 84-1314 by Sec. 3, Ch. 525, L. 1975; amd. Sec. 1, Ch. 164, L. 1977; R.C.M. 1947, § 4-1314.

15-35-104. Quarterly statement and payment of tax. Each coal mine operator shall compute the severance tax due on each quarter-year's worth of production on forms prescribed by the department. The statement shall indicate the tonnage produced, the average Btu value of the production, the contract sales price received for the production, and such other information as the department may require. The completed form in duplicate, with the tax payment, shall be delivered to the department not later than 30 days following the

close of the quarter. The form shall be signed by the operator if the operator is an individual or by an officer of the coal mine operator if the operator is a business entity. A person operating more than one coal mine in this state may include all of his mines in one statement. The department may grant a reasonable extension of time for filing statements and payment of taxes due upon good cause shown therefor.

History: En. 84-1315 by Sec. 4, Ch. 525, L. 1975; R.C.M. 1947, 84-1315; amd. Sec. 1, Ch. 334, L. 1981.

15-35-105. Penalty for delinquent tax. The department shall add to the amount of all delinquent severance taxes a penalty of 10% of the delinquent amount plus interest at the rate of 1% per month or fraction thereof computed on the total amount of severance tax and penalty. Interest shall be computed from the date the severance tax was due to the date of payment. The department shall mail to the person required to file a quarterly report and pay any severance tax, a letter setting forth the amount of tax, penalty, and interest due, and the letter shall further contain a statement that if payment is not made, a warrant for distraint may be filed. The penalty amount may be waived by the department if reasonable cause for the failure or neglect to file the quarterly statement is provided to the department.

History: En. 84-1316 by Sec. 5, Ch. 525, L. 1975; R.C.M. 1947, 84-1316; amd. Sec. 16, Ch. 439, L. 1981.

15-35-106. Annual testing of samples. The Montana state bureaus of mines and geology shall test coal production subject to this chapter and may maker rules governing the collection of test data. A person subject to this chapter shall submit to the bureau on or before August 1 each year a sample of mine-run, "as is" coal from each mine producing that year. Additional samples shall be submitted at the request of the bureau. The bureau shall compute the Btu per pound of each sample received and forward this information to the department prior to September 1 each year.

History: En. 84-1317 by Sec. 6, Ch. 525, L. 1975; R.C.M. 1947, 84-1317.

15-35-107. When value of coal may be imputed — procedure. (1) The department may impute a value to the coal which approximates market value f.o.b. mine in a case where:

(a) the operator of a coal mine is using the produced coal in an energy-conversion or other manufacturing process;

(b) a person sells coal under a contract which is not an arm's-length agreement; or

(c) a person neglects or refuses to file a statement and tax return under this chapter.

(2) When imputing value, the department may apply the factors used by the federal government under 26 U.S.C., section 613, or that provision as it may be labeled or amended, in determining gross income from mining or the department may apply any other or additional criteria it considers appropriate. Each subject taxpayer shall upon request by the department furnish a copy of its federal income tax return, with any amendments, filed for the year in which the value of coal is being imputed and copies of the contracts under which it is selling coal at the time. When the department's estimate of market value is contested in any proceeding, the burden of proof is on the contesting party.

History: En. 84-1318 by Sec. 7, Ch. 525, L. 1975; R.C.M. 1947, 84-1318.

15-35-108. *(Temporary)* **Disposal of severance taxes.** Severance taxes collected under the provisions of this chapter are allocated as follows:

(1) To the trust fund created by Article IX, section 5, of the Montana constitution, 25% of total collections a year. After December 31, 1979, 50% of coal severance tax collections are allocated to this trust fund. The trust fund moneys shall be deposited in the fund established under 17-6-203(5) and invested by the board of investments as provided by law.

(2) Coal severance tax collections remaining after allocation to the trust fund under subsection (1) are allocated in the following percentages of the remaining balance:

(a) to the county in which coal is mined, 2% of the severance tax paid on the coal mined in that county until January 1, 1980, for such purposes as the governing body of the county may determine;

(b) 2½% until December 31, 1979, and thereafter 4½% to the earmarked revenue fund to the credit of the alternative energy research development and demonstration account;

(c) 26½% until July 1, 1979, and thereafter 37½% to the earmarked revenue fund to the credit of the local impact and education trust fund account;

(d) for each of the 2 fiscal years following June 30, 1977, 13% to the earmarked revenue fund to the credit of the coal area highway improvement account;

(e) 10% to the earmarked revenue fund for state equalization aid to public schools of the state;

(f) 1% to the earmarked revenue fund to the credit of the county land planning account;

(g) 2½% to the sinking fund to the credit of the renewable resource development bond account;

(h) 5% to the earmarked revenue fund to the credit of a trust fund for the purpose of parks acquisition or management, protection of works of art in the state capitol, and other cultural and aesthetic projects. Income from this trust fund shall be appropriated as follows:

(i) 1/3 for protection of works of art in the state capitol and other cultural and aesthetic projects; and

(ii) 2/3 for the acquisition of sites and areas described in 23-1-102 and the operation and maintenance of sites so acquired;

(i) 1% to the earmarked revenue fund to the credit of the state library commission for the purposes of providing basic library services for the residents of all counties through library federations and for payment of the costs of participating in regional and national networking;

(j) ½ of 1% to the earmarked revenue fund for conservation districts;

(k) all other revenues from severance taxes collected under the provision of this chapter to the credit of the general fund of the state.

15-35-108. *(Effective July 1, 1983)* **Disposal of severance taxes.** Severance taxes collected under the provisions of this chapter are allocated as follows:

(1) To the trust fund created by Article IX, section 5, of the Montana constitution, 25% of total collections a year. After December 31, 1979, 50% of coal severance tax collections are allocated to this trust fund. The trust fund moneys shall be deposited in the fund established under 17-6-203(5) and invested by the board of investments as provided by law.

(2) Coal severance tax collections remaining after allocation to the trust fund under subsection (1) are allocated in the following percentages of the remaining balance:

(a) to the county in which coal is mined, 2% of the severance tax paid on the coal mined in that county until January 1, 1980, for such purposes as the governing body of the county may determine;

(b) 2½% until December 31, 1979, and thereafter 37½% to the earmarked revenue fund to the credit of the alternative energy research development and demonstration account;

(c) 26½% until July 1, 1979, and thereafter 4 ½% to the earmarked revenue fund to the credit of the local impact and education trust fund account;

(d) for each of the 2 fiscal years following June 30, 1977, 13% to the earmarked revenue fund to the credit of the coal area highway improvement account;

(e) 10% to the earmarked revenue fund for state equalization aid to public schools of the state;

(f) 1% to the earmarked revenue fund to the credit of the county land planning account;

(g) 1¼% to the sinking fund to the credit of the renewable resource development bond account;

(h) 5% to the earmarked revenue fund to the credit of a trust fund for the purpose of parks acquisition or management, protection of works of art in the state capitol, and other cultural and aesthetic projects. Income from this trust fund shall be appropriated as follows:

(i) 1/3 for protection of works of art in the state capitol and other cultural and aesthetic projects; and

(ii) 2/3 for the acquisition of sites and areas described in 23-1-102 and the operation and maintenance of sites so acquired;

(i) 1% to the earmarked revenue fund to the credit of the state library commission for the purposes of providing basic library services for the residents of all counties through library federations and for payment of the costs of participating in regional and national networking;

(j) ½ of 1% to the earmarked revenue fund for conservation districts;

(k) 1¼% to the sinking fund to the credit of the water development sinking account;

(l) all other revenues from severance taxes collected under the provisions of this chapter to the credit of the general fund of the state.

History: En. 84-1309.1 by Sec. 2, Ch. 432, L. 1973; amd. Sec. 1 Ch. 250, L. 1974; and Sec. 4, Ch. 501, L. 1975; amd. Sec. 3, Ch. 502, L. 1975; amd. and redes. 84-1319 by Sec. 8, Ch. 525, L. 1975; amd. Sec. 2, Ch. 156, L. 1977; amd. Sec. 1, Ch. 540, L. 1977; amd. Sec. 2, Ch. 549, L. 1977; R.C.M. 1947, 84-1319; amd. Sec. 1, Ch. 653, L. 1979; amd. Sec. 1, Ch. 694, L. 1979; amd. Sec. 1, Ch. 479, L. 1981; amd. Sec. 43, Ch. 505, L. 1981.

15-35-109. Repealed. Sec. 1, Ch. 407, L. 1981.
History: En. 84-1325 by Sec. 18, Ch. 525, L. 1975; R.C.M. 1947, 84-1325.

15-35-110. Penalties for neglect or false statement. A person who fails, neglects, or refuses to file any statement required under this chapter or who makes a false statement commits a misdemeanor. A person convicted under this section shall be fined not to exceed $1,000 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: En. 84-1324 by Sec. 13, Ch. 525, L. 1975; R.C.M. 1947, 84-1324.

15-35-111. Rulemaking authority. The department of revenue my adopt rules necessary for the taxation of property under this chapter.

History: En. Sec. 32, Ch. 581, L. 1979.

APPENDIX G

THE MINERAL LEASING ACT OF MAY 11, 1938, 52 STAT. 347 [CODIFIED, AS AMENDED, AT 25 U.S.C.A. §§ 396a-396g (1976)], PROVIDES IN PERTINENT PART:

§ 396a. Leases of unalloted lands for mining purposes — Duration of leases

Hereafter unalloted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, except those hereinafter specifically excepted from the provisions of this Act [25 USCS §§ 396a and note-396g], may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesman for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.
(May 11, 1938, c. 198, § 1, 52 Stat. 347.)

§ 396b. Public auction of oil and gas leases — Requirements

Leases for oil- and/or gas-mining purposes covering such unallotted lands shall be offered for sales to the highest responsible bidder, at public auction or on sealed bids, after notice and advertisement, upon such terms and subject to such conditions as the Secretary of the Interior may prescribe. Such advertisement shall reserve to the Secretary of the Interior the right to reject all bids whenever in his judgment the interest of the Indians will be served by so doing, and if no satisfactory bid is received, or the accepted bidder fails to complete the lease, or the Secretary of the Interior shall determine that it is unwise in the interest of Indians to accept the highest bid, said Secretary may readvertise such lease for sale, or with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations: Provided, That the foregoing provisions shall in no manner restrict the right of tribes organized and incorporated under sections 16 and 17 of the Act of June 18, 1934 (48 Stat. 984) [25 USCS §§ 476, 477], to lease lands for mining purposes as therein provided and in accordance with the provisions of any constitution and charter adopted by any Indian tribe pursuant to the Act of June 18, 1934 [25 USCS §§ 461-463, 464, 465, 466-470, 471-473, 474, 475, 476-478, 479].

(May 11, 1938, c. 198, § 2, 52 Stat. 347.)

§ 396d. Rules and regulations governing operations — Limitations on oil or gas leases

All operations under any oil, gas, or other mineral lease issued pursuant to the terms of this [25 USCS §§ 396a and note-396g] or any other Act affecting restricted Indian lands shall be subject to the rules and regulations promulagated by the Secretary of the Interior. In the discretion of the said Secretary, any lease for oil or gas issued under the provisions of this Act [25 USCS §§ 396a and note-396g] shall be made subject to the terms of any reasonable cooperative unit or other plan approved or prescribed by said Secretary prior or subsequent to the issuance of any such lease which involves the development or production of oil or gas from land covered by such lease.

(May 11, 1938, c. 198, § 4, 52 Stat. 348.)

§ 396e. Officials authorized to approve leases

The Secretary of the Interior may, in his discretion, authorize superintendents or other officials in the Indian Service to approve leases for oil, gas, or other mining purposes covering any restricted Indian lands, tribal or allotted.

(May 11, 1938, c. 198, § 5, 52 Stat. 348.)

§ 396f. Lands excepted from leasing provisions

Sections 1, 2, 3, and 4 of this Act [25 USCS §§ 396a-396d] shall not apply to the Crow Reservation in Montana, the ceded lands of the Shoshone Reservation in Wyoming, the Osage Reservation in Oklahoma, nor to the coal and asphalt lands of the Coctaw and Chickasaw Tribes in Oklahoma.
(May 11, 1938, c. 198, § 6, 52 Stat. 348; May 27, 1955, c. 106, § 2, 69 Stat. 68.)

§ 396g. Lease of lands for subsurface storage of oil and gas

The Secretary of the Interior, to avoid waste or to promote the conservation of natural resources or the welfare of the Indians, is hereby authorized in his discretion to approve leases of lands that are subject to lease under section 1 of this Act [25 USCS § 396a] or the

Act of March 3, 1909 (35 Stat. 783, 25 U.S.C. 396) [25 USCS § 396], for the subsurface storage of oil and gas, irrespective of the lands from which initially produced, and the Secretary is hereby authorized, in order to provide for the subsurface storage of oil or gas, to approve modifications, amendments, or extensions of the oil and gas or other mining lease(s), if any, in effect as to restricted Indian lands, tribal or allotted, and may promulgate rules and regulations consistent with such leases, modifications, amendments, and extensions, relating to the storage of oil or gas thereunder. Any such leases may provide for the payment of a storage fee or rental on such stored oil or gas or, in lieu of such fee or rental, for a royalty other than that prescribed in the lease when such stored oil or gas is produced in conjunction with oil or gas not previously produced. It may be provided that any oil and gas lease under which storage of oil or gas is so authorized shall be continued in effect at least for the period of such storage use and so long thereafter as oil or gas not previously produced is produced in paying quantities.

(May 11, 1938, c. 198, § 8, as added Aug. 1, 1956, c. 808, 70 Stat. 774.)

APPENDIX H

SUBCHAPTER P — MINING

PART 171 — LEASING OF TRIBAL LANDS FOR MINING

§ 171.1 Definitions.

(a) The term "superintendent" in this part refers to the superintendent or other officer of the Bureau of Indian Affairs or of the Government who may have jurisdiction over the lands involved.

(b) The term "supervisor" in this part refers to a representative of the Secretary of Interior, under direction of the United States Geological Survey, authorized and empowered to supervise and direct operations under oil and gas or other mining leases, to furnish scientific and technical information and advice, to ascertain and record the amount and value of production, and to determine and record rentals and royalties due and paid.

CROSS REFERENCE: For rules and regulations of the Geological Survey, see 30 CFR Chapter II.

HOW TO ACQUIRE LEASES

§ 171.1a Existing Permits Or Leases On Minerals Acquired For The Ute Indian Tribe Of The Uintah And Ouray Reservation, Utah, And The Pueblos Of Zia And Jemez, New Mexico.

By the Act of July 14, 1956 (70 Stat. 546), title to the minerals underlying certain lands in Utah was vested in the United States in trust for the Ute Indian Tribe of the Uihtah and Ouray Reservation and by the Act of August 2, 1956 (70 Stat. 941), title to certain land in New Mexico and the improvements thereon was declared to be in the United States of America in trust for the Pueblos of Zia and Jemez, subject to valid and existing rights. Existing mineral prospecting permits and mining leases on these lands issued pursuant to 43 CFR and all action on the permits and leases shall be administered by the Secretary of the Interior or his authorized representative in accordance with the regulations set forth in Title 43 of the Code of Federal Regulations, except as follows:

(a) Appeals from administrative action shall be made pursuant to applicable regulations set forth in this title.

(b) Payments or reports required by the leases, permits, or regulations in 43 CFR shall be made to the Superintendent having jurisdiction over the land involved instead of the officer of the Bureau of Land Management designated in Title 43 of the Code of Federal Regulations.

[25 FR 12408, Dec. 3, 1960]

§ 171.2 Leases To Be Made By Tribes.

Indian tribes, bands or groups may, with the approval of the Secretary of the Interior or his authorized representative, lease their land for mining purposes. No oil and gas lease shall be approved unless it has fist been offered at an advertised sale in accordance with § 171.3. Leases for minerals other than oil and gas shall be advertised for bids as prescribed in § 171.3 unless the Commissioner grants to the Indian owners written permission to negotiate for a lease. Negotiated leases, accompanied by proper bond and other supporting papers, shall be filed with the Superintendent of the appropriate Indian Agency within 30 days after such permission shall have been granted by the Commissioner to negotiate the lease. The appropriate Area Director is authorized in proper cases to grant a reasonable extension of this period prior to its expiration. The right is reserved to the Secretary of the Interior to direct that negotiated leases be rejected and that they be advertised for bids. All leases shall be approved by the Secretary of the Interior or his duly authorized representative.

[23 FR 9393, Dec. 4, 1958]

§ 171.3 Sale Of Oil And Gas Leases.

(a) At such times and in such manner as he may deem appropriate, after being authorized by the tribal council or other authorized representative of the tribe, the superintendent shall publish notices at least thirty days prior to the sale, unless a shorter period is authorized by the Commissioner of Indian Affairs, that oil and gas leases on specific tracts, each of which shall be in a reasonably compact body, will be offered to the highest responsible bidder for a bonus consideration, in addition to stipulated rentals and royalties. Each bid must be accompanied by a cashier's check, certified check or postal

money order, payable to the payee designated in the invitation to bid, in an amount not less than 25 percent of the bonus bid. Within 30 days after notification of being the successful bidder, said bidder must remit the balance of the bonus, the first year's rental, and his share of the advertising costs, and shall file with the superintendent the ease in completed form. The superintendent may, for good and sufficient reasons, extend the time for the completion and submission of the lease form, but no extension shall be granted for remitting the balance of moneys due. If the successful bidder fails to pay the full consideration within said period, or fails to file the completed lease within said period or extension thereof, or if the lease is disapproved through no fault of the lessor or the Department of the Interior, 25 percent of the bonus bid will be forfeited for the use and benefit of the Indian lessor.

(b) All notices or advertisements of sales of oil and gas leases shall reserve to the Secretary of the Interior the right to reject all bids when in his judgment the interests of the Indians will be best served by so doing, and that if no satisfactory bid is received, or if the accepted bidder fails to complete the lease, or if the Secretary of the Interior shall determine that it is unwise to accept the highest bid, the Secretary may readvertise such lease for sale, or if deemed advisable, with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations. The successful bidder or bidders will be required to pay his or their share of the advertising costs. Amounts received from unsuccessful bidders will be returned; but when no bid is accepted on a tract, the costs of advertising will be assessed against the applicant who requested that said tract be advertised.

[22 FR 10588, Dec. 24, 1957, as amended at 23 FR 7068, Sept. 12, 1958]

§ 171.3a Leases for subsurface storage of oil or gas.

(a) The Secretary of the Interior, or his authorized representative, may approve, subject to obtaining the prior consent of the Indian owners, storage leases, or modifications, amendments, or extensions of oil and gas or other mining leases, on tribal lands subject to lease under the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a), and on

allotted lands subject to lease under the Act of March 3, 1909 (35 Stat. 783; 25 U.S.C. 396), to provide for the subsurface storage of oil or gas, irrespective of the lands from which production is initially obtained. The storage lease, or modification, amendment, or extension, shall provide for the payment of such storage fee or rental on such oil or gas as may be determined adequate in each case, or, in lieu thereof, for a royalty other than that prescribed in the oil and gas lease when such stored oil and gas is produced in conjunction with oil or gas not previously produced.

(b) The Secretary of the Interior or his authorized representative may approve, subject to obtaining the prior consent of the Indian owners, a provision in an oil and gas lease, under which storage of oil and gas is authorized, for continuance of the lease at least for the period of such storage use and so long thereafter as oil or gas not previously produced is produced in paying quantities.

(c) Applications for subsurface storage of oil or gas shall be filed in triplicate with the oil and gas supervisor and shall disclose the ownership of the lands involved, the parties in interest, the storage fee, rental, or royalty offered to be paid for such storage, and all essential information showing the necessity for such project. Enough copies of the final agreement signed by the Indian owners and other parties in interest shall be submitted for the approval of the Secretary, or his authorized representative, to permit retention of five copies by the Department after approval.

[25 FR 9836, Oct. 14, 1960]

§ 171.4 Government Employees Cannot Acquire Leases.

No lease, assignment thereof, or interest therein will be approved to any employee or employees of the United States Government whether connected with the Bureau of Indian Affairs or otherwise, and no employee of the Interior Department shall be permitted to acquire any interest in any mineral lease covering restricted Indian lands by ownership of stock in corporations having such leases or in any other manner.

(R.S. 2078; 25 U.S.C. 68)

§ 171.5 Corporations And Corporate Information.

If the applicant for a lease is a corporation, it shall file evidence of authority of its officers to execute papers; and with its first application it shall also file a certified copy of its articles of incorporation, and, if foreign to the State in which the lands are located, evidence showing compliance with the corporation laws thereof. Statements of changes in officers and stockholders shall be furnished by a corporation lessee to the superintendent January 1 of each year, and at such other times as may be requested. Whenever deemed advisable in any case the superintendent may require a corporation applicant or lessee to file:

(a) Lists of officers, principal stockholders, and directors, with post-office addresses and number of shares held by each.

(b) A sworn statement of the proper officer showing:

(1) The total number of shares of the capital stock actually issued and the amount of cash paid into the treasury on each share sold; or, if paid in property, the kind, quantity, and value of the same paid per share.

(2) Of the stock sold, how much remains unpaid and subject to assessment.

(3) The amount of cash the company has in its treasury and elsewhere.

(4) The property, exclusive of cash, owned by the company and its value.

(5) The total indebtedness of the company and the nature of its obligations.

(6) Whether the applicant or any person controlling, controlled by or under common control with the applicant has filed any registration statement, application for registration, prospectus or offering sheet with the Securities and Exchange Commission pursuant to the Securities to the Securities Act of 1933 or the Securities Exchange Act of 1934 or said Commission's rules ad regulations under said acts; if so, under what provisions of said acts or rules and regulations; and what disposition of any such statement, application, prospectus or offering sheet has been made.

(c) Affidavits of individual stockholders, setting forth in what corporations or with what persons, firms, or associations such individual stockholders are interested in mining leases on restricted lands within the State, and whether they hold such interests for themselves or in trust.

CROSS REFERENCE: For rules and regulations of the Securities and Exchange Commission, see 17 CFR Chapter II.

§ 171.6 Bonds.

(a) Lessee shall furnish with each lease a bond (Form 5-154b), and an assignee of a lease shall furnish with each assignment a bond (Form 5-154m), with an acceptable company authorized to act as sole surety, or with two or more personal sureties and a deposit as collateral security of any public-debt obligations of the United States guaranteed as to principal and interest by the United States, equal to the full amount of such bonds, or other collateral satisfactory to the Secretary of the Interior, or show ownership of unencumbered real estate of the value equal to twice the amount of the bonds. Lessee may file a bond on Form 5-154a without sureties and a deposit as collateral security of Government bonds equal in value to the full amount of the bond. Lease bonds shall not be less than the following amounts:

For less than 80 acres	$1,000
For 80 acres and less than 120 acres	1,500
For 120 acres and not more than 160 acres	2,000
For each additional 40 acres, or part thereof, above 60 acres	500

Provided, That for leases for minerals other than oil and gas the Secretary of the Interior or his authorized representative with the consent of the Indian landowner may authorize a bond for a lesser amount if, in his opinion, the circumstances warrant and the interests of the Indian landowners are fully protected: *Provided further*, That a lessee may file one bond (Form 5-154f), in the sum of $15,000 for all leases on that part of an Indian reservation extending into State contiguous thereto, to which the lessee may become a party; *And*

provided, further, That the total acreage covered by the bond shall not exceed 10,240 acres.

(b) In lieu of the bonds required under paragraph (a) of this section, a lessee may furnish a bond (Form 5-156) in the sum of $75,000 for full nationwide coverage with an acceptable company authorized to act as sole surety to cover all oil and gas leases and oil and gas prospecting permits without geographic or acreage limitation to which the lessee or permittee is or may become a party.

(c) The right is specifically reserved to increase the amount of bonds and the collateral security prescribed in paragraph (a) of this section in any particular case when the officer in charge deems it proper to do so. The nationwide bond may be increased at any time in the discretion of the Secretary of the Interior.

[22 FR 10588, Dec. 24, 1957, as amended at 26 FR 164, Jan. 10, 1961]

§171.7 Lessees To Furnish Additional Information.

The superintendent may, either before or after approval of a lease, call for any additional information desired to carry out the regulations in this part. If a lessee shall fail to furnish the papers necessary to put his lease and bond in proper form for consideration, the superintendent shall forward such lease for disapproval.

§ 171.8 Lands To Be In Compact Body.

The area covered by lease shall be in a reasonably compact body and shall conform to the system of public-land surveys, except that leases covering lode ground may consist of one or more adjoining parellelograms 1,500 feet in length by 600 feet in width, as provided by the United States mining laws. No lease under the regulations in this part shall convey any extralateral rights, and no coal lease shall have a length exceeding 1 mile along the outcrop.

§ 171.9 Acreage Limitation.

A lessee may acquire more than one lease but no single lease shall be granted for mining purposes on Indian tribal or restricted Indian

lands, exclusive of Osage and Quapaw lands, in excess of the following acreage except where the rule of approximation applies:

(a) For oil and gas and all other minerals, except coal, 2,560 acres.

(b)(1) For coal, a lease shall ordinarily be limited to 2,560 acres. The Commissioner may, however, upon application, approve the combining of leases held by one or more lessees, or approve the issuance of a single lease for more than 2,560 acres in a reasonably compact form, if he shall find that the approval of such larger acreage is in the interest of the lessor and is necessary to permit the establishment or construction of thermal electric power plans or other industrial facilities on or near the reservation. He may prescribe provisions in such larger leases to require relinquishment of acreage in the event of failure to construct facilities, or may require advance rental or minimum royalty payments on a part of the acreage as a condition for combining leases or issuance of a single lease in excess of 2,560 acres.

(2) The Commissioner, with the consent of the lessor, may alter, change, or modify the development and producing requirements of the several leases and provide that operations and production on one lease shall be deemed to satisfy the development and producing requirements as to each lease combined.

§ 171.10 Term Of Leases.

Mining leases may be made for a specified term not to exceed ten years from the date of approval by the Secretary of the Interior, or his authorized representative, and as much longer as the substances specified in the lease are produced in paying quantities.

§ 171.11 Government Reserves Right To Buy Minerals Produced.

In time of war or other public emergency all of the executive departments of the United States Government shall have the option to purchase at the posted market price on the date of sale all or any part of the substance or substances produced under any lease.

RENTS AND ROYALTIES

§ 171.12 Manner Of Payments.

(a) Except where otherwise provided by the terms of leases where the tribes are organized under the act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), all rents and other payments due under leases which have been or may be approved by the Secretary of the Interior shall be paid to the superintendent or to such other person as may be designated by the Secretary of the Interior, for the benefit of the lessors. Except advance payments for the first year which shall be sent direct to the superintendent at the time of filing leases, payments of rental and royalty under leases shall be transmitted through the supervisor, shall be accompanied by a statement by the lessee, in triplicate, showing the specific items of rental or royalty that the remittance is intended to cover, and shall be made at such time or times as the lease provides.

(b) In the event of the discovery of minerals in paying quantities all advance payments shall be allowed as credit on stipulated royalties for the year for which such advance payments have been made. No refund will be made under oil, gas, or other mining leases, in the event that royalty from production is not sufficient to equal the advance payment, nor will any part of the money so paid be refunded to the lessee because of any subsequent surrender or cancellatio of the lease, nor shall the lessee be relieved from the obligation to pay said advance rental annually when it becomes due, by reason of any subsequent surrender or cancellation of the lease.

§ 171.13 Rates Of Rentals And Royalties Under Oil And Gas Leases.

(a) The lessee shall pay, beginning with the date of approval of oil and gas leases by the Secretary of the Interior, a rental of $1.25 per acre per annum in advance during the continuance thereof, together with a royalty of 12½ percent of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased, save and except oil, and/or gas used by the lessee for development and operation purposes on the lease, which oil or gas shall be royalty free. A higher rate of royalty may be fixed by the Secretary of the Interior or his authorized

representative, prior to the advertisement of land for oil and gas leases. During the period of supervision, "value" for the purposes of the lease may, in the discretion of the Secretary of the Interior, be calculated on the basis of the highest price paid or offered (whether calculated on the basis of short or actual volume) at the time of production for the major portion of the oil of the same gravity, and gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances as determined by the supervisor. The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary of the Interior, be deemed mere evidence of or conclusive evidence of such value. When paid in value, such royalties shall be due and payable monthly on the last day of the calendar month following the calendar month in which produced; when royalty on oil produced is paid in kind, such royalty oil shall be delivered in tanks provided by the lessee on the premises where produced without cost to the lessor unless otherwise agreed to by the parties thereto, at such time as may be required by the lessor. The lessee shall not be required to hold such royalty oil in storage longer than 30 days after the end of the calendar month in which said oil is produced. The lessee shall be in no manner responsible or held liable for loss or destruction of such oil in storage by causes beyond the lessee's control. In determining the value for royalty purposes of products, such as natural gasoline, that are derived from treatment of gas, a reasonable allowance for the cost of manufacture shall be made, such allowance to be two-thirds of the value of the marketable product unless otherwise determined by the Secretary of the Interior on application of the lessee or on his own initiative, and that royalty will be computed on the value of gas or casing-head gas, or on the products thereof (such as residue gas, natural gasoline, propane, butane, etc.), whichever is the greater.

(b) If the leased premises produce gas in excess of the lessee's requirements for the development and operation of said premises, then the lessor may use sufficient gas, free of charge, for any desired school or other buildings belonging to the tribe, by making his own connections to a regulator installed, connected to the well and main-

tained by the lessee, and the lessee shall not be required to pay royalty on gas so used. The use of such gas shall be at the lessor's risk at all times.

§ 171.14 Annual Rentals And Expenditures For Development On Leases Other Than Oil And Gas.

(a) Unless otherwise authorized by the Secretary or his authorized representative (1) a lease for minerals other than oil and gas shall provide for a yearly development expenditure of not less than $10 per acre and (2) all such leases shall provide for a rental payment of not less than $1 for each acre or fraction of an acre payable on or before the first day of each lease year.

(b) Within 20 days after the lease year, an itemized statement, in duplicate, of the expenditure for development under a lease for minerals other than oil and gas shall be filed with the superintendent. The lessee must certify the statement under oath.

§ 171.14a Suspension Of Operations And Production On Leases For Minerals Other Than Oil And Gas.

The Secretary of the Interior or his authorized representative, after obtaining the consent of the tribe, may authorize suspension of operating and producing requirements on mining leases for minerals other than oil and gas whenever during the primary term of the leases, it is considered that marketing facilities are inadequate or economic conditions unsatisfactory. Applications by lessees for relief from all operating and producing requirements on such mineral leases shall be filed in triplicate, in the office of the Regional Mining Supervisor of the Geological Survey and a copy thereof filed with the Superintendent. Complete information must be furnished showing the necessity for such relief. Suspension of operations and production shall not relieve the lessee from the obligations of continued payment of the annual rental or the minimum royalty.

[24 FR 9510, Nov. 26, 1959]

§ 171.15 Royalty Rates For Minerals Other Than Oil And Gas.

Unless otherwise authorized by the Commissioner of Indian Affairs, the minimum rates for minerals other than and gas shall be as follows:

(a) For substances other than gold, silver, copper, lead, zinc, tungsten, coal, asphaltum and allied substances, oil, and gas, the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 percent of the value, at the nearest shipping point, of all ores, metals, or minerals marketed.

(b) For gold and silver the lessee shall pay quarterly, or as otherwise provided in the lease, a royalty of not less than 10 percent to be computed on the value of bullion as shown by mint returns after deducting forwarding charges to the point of sale; and for copper, lead, zinc, and tungsten, a royalty of not less than 10 percent to be computed on the value of ores and concentrates as shown by reduction returns after deducting freight charges to the point of sale. Duplicate returns shall be filed by the lessee with the Superintendent within 10 days after the ending of the quarter or other period specified in the lease within which such returns are made: *Provided, however*, That the lessee shall pay a royalty of not less than 10 percent of the value of the ore or concentrates sold at the mine unless otherwise provided in the lease.

(c) For coal the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 cents per ton of 2,000 pounds of mine run, or coal as taken from the mine, including what is commonly called "slack."

(d) For asphaltum and allied substances the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 cents per ton of 2,000 pounds on crude material or not less than 60 cents per ton on refined substances.

§ 171.16 Time Of Making Royalty Payments.

Royalty payments under producing oil and gas leases shall be made monthly on or before the last day of the calendar month folowing the calendar month for which such payment is to be made.

§ 171.17 Division Orders.

(a) Lessees may make arrangements with the purchasers of oil for the payment of the royalties to the superintendent by such purchasers, but such arrangement, if made, shall not operate to relieve a lessee from responsibility should the purchaser fail or refuse to pay royalties when due. Where lessees avail themselves of this privilege, division orders permitting the pipe line companies or other purchasers of the oil to withhold the royalty interest shall be executed and forwarded to the supervisor for approval, as pipe line companies are not permitted to accept or run oil from leased Indian lands until after the approval of a division order showing that the lessee has a lease regularly approved and in effect. When the lessee company runs its own oil, it shall execute an intracompany division order and forward it to the supervisor for his consideration. That right is reserved for the supervisor to cancel a division order at any time or require the pipe line company to discontinue to run the oil of any lessee who fails to operate the lease properly or otherwise violates the provisions of the lease, of the regulations in this part, or of the operating regulations.

(b) When oil is taken by authority of a division order, the lessee or his representative shall be actually present when the oil is gauged and records are made of the temperature, gravity, and impurities. The lessee will be held responsible for the correctness and the correct recording and reporting of all of the foregoing measurements; which, except lowest gauge, shall be made at the time the oil is turned into the pipe line. Failure of the lessee to perform properly these duties will subject the division order to revocation.

CROSS REFERENCE: For oil and gas operating regulations of the Geological Survey, see 30 CFR Part 221.

§ 171.18 Inspection Of Premises, Books And Accounts.

Lessees shall agree to allow the lessors and their agents or any authorized representative of the Interior Department to enter, from time to time, upon and into all parts of the leased premises for the purpose of inspection, and shall further agree to keep a full and correct account of all operations and make reports thereof, as required by the regulations of the Department governing operations on public

and restricted Indian lands, and their books and records, showing manner of operations and persons interested, shall be open at all times for examination of such officers of the Department as shall be instructed in writing by the Secretary of the Interior or authorized by regulations to make such examination.

§ 171.19 Diligence And Prevention Of Waste.

The lessee shall exercise diligence in drilling and operating wells for oil and gas on the leased lands while such products can be secured in paying quantities; carry on all operations in a good and work-man-like manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the productive sands or oil or gas-bearing strata to the destruction or injury of the oil or gas deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; plug securely all wells before abandoning the same and to shut off effectually all water from the oil or gas-bearing strata; not drill any well within 200 feet of any house or barn on the premises without the lessor's written consent approved by the superintendent; carry out at his expense all reasonable orders and requirements of the supervisor relative to prevention of waste, and preservation of the property and the health and safety of workmen; bury all pipelines crossing tillable lands below plow depth unless other arrangements therefor are made with the superintendent; pay the lessor all damages to crops, buildings, and other improvements of the lessor occasioned by the lessee's operations: *Provided*, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

§ 171.20 Permission To Start Operations.

(a) No operations will be permitted on any lease before it is approved by the Secretary of the Interior.

(b) Written permission must be secured from the supervisor before any operations are started on the leased premises. After such permission is secured the operations must be in accordance with the

operating regulations promulgated by the Secretary of the Interior. Copies of the regulations in this part may be secured from either the supervisor or the superintendent and no operations shall be attempted without a study of the operating regulations.

§ 171.21 Restrictions On Operations

(a) Oil and gas leases issued under the provisions of the regulations in this part shall be subject to imposition by the Secretary of the Interior of such restrictions as to time or times for the drilling of wells and as to the production from any well or wells as in his judgment may be necessary or proper for the protection of the natural resources of the leased land and in the interest of the lessor. In the exercise of his judgment the Secretary of the Interior may take into consideration, among other things, the Federal laws, State laws, regulations by competent Federal or State authorities, lawful agreements among operators regulating either drilling or production, or both, and any regulatory action desired by tribal authorities.

(b) All such leases shall be subject to any cooperative or unit development plan affecting the leased lands that may be required by the Secretary of the Interior, but no lease shall be included in any cooperative or unit plan without prior approval of the Secretary of the Interior and consent of the Indian tribe affected.

§ 171.22 Penalties.

Failure of the lessee to comply with any provisions of the lease, of the operating regulations, of the regulations in this part, order of the superintendent or his representative, or of the orders of the supervisor or his representative, shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a penalty of not more than $500 per day for each and every day the terms of the lease, the regulations, or such orders are violated; or to both such penalty and cancellation: *Provided*, That the lessee shall be entitled to notice and hearing, within 30 days after such notice, with respect to the terms of the lease, regulations, or orders violated, which hearing shall be held by the supervisor, whose findings shall be conclusive unless an appeal be taken to the Secretary of the Interior within 30 days after

notice of the supervisor's decision, and the decision of the Secretary of the Interior upon appeal shall be conclusive.

§ 171.23 Mines To Be Timbered Properly.

In mining operations the lessee shall keep the mine well and sufficiently timbered at all points where necessary, in accordance with good mining practice, and in such manner as may be necessary to the proper preservation of the leased property and safety of the workmen.

§ 171.24 Surrender Of Leased Premises In Good Condition.

On expiration of the term of a lease, or when a lease is surrendered, the lessee shall deliver to the Government the leased ground with the mine workings in good order and condition, and bondsmen will be held for such delivery in good order and condition, unless relieved by the Secretary of the Interior for cause. It shall, however, be stipulated that the machinery necessary to operate the mine is the property of the lessee, but that it may be removed by him only after the condition of the property has been ascertained by inspection by the Secretary of the Interior or his authorized agents, to be in satisfactory condition.

§ 171.25 Fees.

Unless otherwise authorized by the Secretary of the Interior or his authorized representative, each lease, mining permit, sublease, or assignment shall be accompanied at the time of filing by a fee of $10. Such fee will not be required on sand and gravel permits issued to States, counties, or other municipal bodies.

(Sec. 1, 41 Stat. 415, as amended: 25 U.S.C. 413)

[24 FR 7949, Oct 2, 1959]

§ 171.26 Assignments And Overriding Royalties.

(a) Approved leases or any interest therein may be assigned or transferred only with the approval of the Secretary of the Interior, and to procure such approval the assignee must be qualified to hold such lease under existing rules and regulations and shall furnish a satisfactory bond conditioned for the faithful performance of the

covenants and conditions thereof: *Provided*, That in order for such assignment to receive favorable consideration the lessee shall assign either his whole interest or an undivided interest in the whole lease.

(b) No lease or interest therein or the use of such lease shall be assigned, sublet, or transferred, directly or indirectly by working or drilling contract, or otherwise, without the consent of the Secretary of the Interior.

(c) Assignments of leases, and stipulations modifying the terms of existing leases, which stipulations are also subject to the approval of the Secretary of the Interior, shall be filed with the superintendent within 30 days after the date of execution.

(d) Agreements creating overriding royalties or payments out of production on oil and gas leases shall not be considered as interests in the leases as such term is used in this section. Agreements creating overriding royalties or payments out of production are hereby authorized and the approval of the Department of the Interior or any agency thereof not be required with respect thereto, but such agreements shall be subject to the condition that nothing in any such agreement shall be construed as modifying any of the obligations of the lessee, including, but not limited to, obligations for diligent development and operation, protection against drainage, compliance with oil and gas operating regulations (30 CFR Part 221), and the requirement for departmental approval before abandonment of any well. All such obligations are to remain in full force and effect, the same as if free of any such royalties or payments. The existence of agreements creating overriding royalties or payments out of production, whether or not actually paid, shall not be considered as justification for the approval of abandonment of any well. Nothing in this paragraph revokes the requirement for approval of assignments and other instruments which is required in this section, but any overriding royalties or payments out of production created by the terms of such assignments or instruments shall be subject to the condition stated above. Agreements creating overriding royalties or payments out of production need not be filed with the Superintendent unless incorporated in assignments or instruments required to be filed pursuant to this section.

[22 FR 10588, Dec. 24, 1957, as amended at 23 FR 9738, Dec. 18, 1958]

§ 171.27 Cancellation.

(a) When, in the opinion of the Secretary of the Interior, the lessee has violated any of the terms and conditions of a lease or of the applicable regulations, the Secretary of the Interior shall have the right at any time after 30 days' notice to the lessee specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days after issuance of the notice, to declare such lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land.

(b) On the following conditions, the lessee may, on approval of the Secretary of the Interior, surrender a lease or any part of it:

(1) That he make application for cancellation to the superintendent having jurisdiction over the land.

(2) That he pay a surrender fee of $1 at the time the application is made.

(3) That he pay all royalties and rentals due to the date of such application.

(4) That he make a satisfactory showing that full provision has been made for conservation and protection of the property and that all wells, drilled on the portion of the lease surrendered, have been properly abandoned.

(5) If the lease has been recorded, that he file, with his application, a recorded release of the acreage covered by the application.

(6) If the application is for the cancellation of the entire lease or the entire undivided portion, that he surrender the lease: *Provided*, That where the application is made by an assignee to whom no copy of the lease was delivered, he will be required to surrender only his copy of the assignment.

(7) If the lease (or portion being surrendered or canceled) is owned in undivided interests by more than one party, then all parties shall join in the application for cancellation.

(8) That all required fees and papers must be in the mail or received on or before the date upon which rents and royalties become

due, in order for the lessee and his surety to be relieved from liability for the payment of such royalties and rentals.

(9) If there has been a contest respecting a lease or leases, the approved, the disapproved, or the canceled parts thereof will be held in the office of the superintendent for 5 days after the Department's decision has been promulgated, by mail or delivery, and will not be delivered, if within that period a motion for review and reconsideration be filed, until such motion is passed upon by the Department.

(10) In the event oil or gas is being drained from the leased premises by wells not covered by a lease; the lease, or any part of it, may be surrendered, only on such terms and conditions as the Secretary of the Interior may determine to be reasonable and equitable.

(c) No part of any advance rental shall be refunded to the lessee nor shall he be relieved, by reason of any subsequent surrender or cancellation of the lease, from the obligation to pay said advance rental when it becomes due.

§ 171.27a Prospecting Permits.

With the consent of the tribal authorities the superintendent may issue permits to prospect for minerals other than oil and gas upon tribal lands. Such permits must describe the area to be prospected and definitely state the period of time within which such work is permitted. No ores shall be removed from the reservation under such permits, except samples for assay and experimental purposes. A prospecting permit will not give the permittee any preference right to a lease, unless specifically so stated in the permit, and all permits granting a preference right to a lease must comply with all the laws and regulations applicable to mineral leases on tribal Indian lands.

§ 171.28 Effective Date Of Regulation.

The regulations in this part shall become effective and in full force from and after the date of approval, and shall be subject to change or alteration at any time by the Secretary of the Interior: *Provided*, That no regulations made after the approval of any lease shall operate to affect the term of the lease, rate of royalty, rental, or acreage unless

agreed to by both parties to the lease. All former regulations governing the leasing of tribal lands for mining purposes are superseded by the regulations in this part.

§ 171.29 Exemption Of Leases Made By Organized Tribes.

The regulations in this part may be superseded by the provisions of any tribal constitution, bylaw or charter issued pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 461-479), the Alaska Act of May 1, 1936 (49 Stat. 1250; 48 U.S.C. 362, 258a), or the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C., and Sup., 501-509), or by ordinance, resolution or other action authorized under such constitution, bylaw or charter. The regulations in this part, in so far as they are not so superseded, shall apply to leases made by organized tribes if the validity of the lease depends upon the approval of the Secretary of the Interior.

§ 171.30 Forms.

Leases, assignments, and other instruments shall be on forms prescribed by the Secretary of the Interior or his authorized representative and may be obtained from the superintendent or other officer having jurisdiction over the lands.

[24 FR 7949, Oct. 2, 1959]

APPENDIX I

(Secs. 16, 17, 48 Stat. 987, 988; 25 U.S.C. 476, 477)

PART 173 — LEASING OF LANDS IN CROW INDIAN RESERVATION, MONT., FOR MINING

§ 173.1 Definitions.

(a) The term "superintendent" in this part refers to the superintendent or other officer of the Bureau of Indian Affairs or of the Government who may have jurisdiction over the Crow Reservation.

(b) The term "supervisor" in this part refers to a representative of the Secretary of the Interior, under direction of the Director of the United States Geological Survey, authorized and empowered to supervise and direct operations under oil and gas or other mining leases, to furnish scientific and technical information and advice, to ascertain and record the amount and value of production, and to determine and record rentals and royalties due and paid.

CROSS REFERENCE: For rules and regulations of the Geological Survey, see 30 CFR Chapter II.

§ 173.2 Employee Restrictions.

No lease, assignment thereof, or interest therein will be approved to any employee or employees of the United States Government whether connected with the Bureau or otherwise, and no employee of the Interior Department shall be permitted to acquire any interest in such leases by ownership of stock in corporations having leases or in any other manner.

(R.S. 2078; 25 U.S.C. 68)

§ 173.3 Requests For Sales.

No oil and gas lease on the Crow Reservation will be offered until the Crow tribal council shall have passed a resolution requesting the Secretary of the Interior to lease the land for mining purposes. Should any person, firm, or corporation desire to have any particular tract of land offered for lease, written request to that effect should be sub-

mitted to the superintendent in order that such tract may, if deemed advisible, upon the request of the Crow tribal council, be included in the next advertisement of leases.

§ 172.4 Lease Sales.

(a) At such times and in such manner as he may deem appropriate, the superintendent shall publish notices at least thirty days prior to the sale, unless a shorter period is authorized by the Commissioner of Indian Affairs, that mineral leases on specific tracts, each of which shall be in a reasonably compact body, will be offered to the highest responsible bidder for a bonus consideration, in addition to stipulated rentals and royalties. Each bid must be accompanied by a cashier's check, certified check, or postal money order, payable to the payee designated in the invitation to bid, in an amount not less than 25 percent of the bonus bid. Within 30 days after notification of being the successful bidder, said bidder must remit the balance of the bonus, the first year's rental, and his share of the advertising costs, and shall file with the superintendent the lease in completed form. The superintendent may, for good and sufficient reasons, extend the time for the completion and submission of the lease form, but no extension shall be granted for remitting the balance of monies due. If the successful bidder fails to pay the full consideration within said period, or fails to file the completed lease within said period or extension thereof, or if the lease is disapproved through no fault of the lessor or the Department of the Interior, 25 percent of the bonus bid will be forfeited for the use and benefit of the Indian's lessor.

(b) All notices or advertisements of sales of mineral leases shall reserve to the Secretary of the Interior the right to reject all bids when in his judgment the interest of the Indians will be best served by so doing, and that if no satisfactory bid is received, or if the accepted bidder fails to complete the lease, or if the Secretary of the Interior shall determine that it is unwise in the interests of the Indians to accept the highest bid, the Secretary may readvertise such lease for sale, or if deemed advisable, with the consent of the tribal council or other governing tribal authorities, a lease may be made by private negotiations. The successful bidder or bidders will be required to pay his or their share of the advertising costs. Amounts received from unsuc-

cessful bidders will be returned; but when no bid is accepted on a tract, the costs of advertising will be assessed against the applicant who requested that said tract be advertised.

§ 173.5 Requirements Of Corporations.

If the applicant for a lease is a corporation, it shall file evidence of authority of its officers to execute papers; and with its first application it shall also file a certified copy of its articles of incorporation, and, if foreign to the State in which the lands are located, evidence showing compliance with the corporation laws thereof. The superintendent may at his discretion require a corporation applicant or lessee to file:

(a) Lists of officers, principal stockholders, and directors, with post office addresses and number of shares held by each.

(b) A sworn statement of the proper officer showing:

(1) The total number of shares of the capital stock actually issued and the amount of cash paid into the treasury on each share sold; or, if paid in property, the kind, quantity, and value of the same paid per share.

(2) Of the stock sold, how much remains unpaid and subect to assessment.

(3) The amount of cash the company has in its treasury and elsewhere.

(4) The property, exclusive of cash, owned by the company and its value.

(5) The total indebtedness of the company and the nature of its obligations.

(6) Whether the applicant or any person controlling, controlled by or under common control with the applicant has filed any registration statement, application for registration, prospectus or offering sheet with the Securities and Exchange Commission pursuant to the Securities Act of 1933 or the Securities Exchange Act of 1934 or said Commission's rules and regulations under said acts; if so, under what provision of said acts or rules and regulations; and

what disposition or any such statement, application, prospectus or offering sheet has been made.

(c) Statements of changes in officers and stockholders.

(d) Affidavits of individual stockholders, setting forth in what corporations or with what persons, firms, or associations such individual stockholders are interested in mining leases on restricted lands within the State, and whether they hold such interests for themselves or in trust.

§ 173.6 Requirements Of Unincorporated Applicants.

Unincorporated applicants shall file such information relative to financial standing and ability to proceed with the development of a lease as the Department of the Interior, through the superintendent of the Crow Indian Agency, may require.

§ 173.7 Bonds.

The provisions of § 171.6 of this subchapter, or as hereafter amended, are applicable to leases under this part.

§ 173.8 Additional Information.

The superintendent may, either before or after approval of a lease, call for any information necessary to carry out the regulations in this part; failure of th lessee to furnish such information or to furnish the papers to put his lease and bond in proper form, will be deemed sufficient reason for disapproval or cancellation, whichever is appropriate, of the lease.

§ 173.9 Renewals.

Leases shall be made for a period not longer than ten years, but lessees may have the right of renewal thereof for a further period of 10 years upon such terms and conditions as the Secretary of the Interior may prescribe and agreed to by the tribal council. Applications for renewals of leases shall be made not later than 60 days prior to the date of expiration of the original lease.

§ 173.10 Lease Acreage.

The provisions of § 171.9 of this subchapter, or as hereafter amended, are applicable to leases under this part.

§ 173.11 Wells.

The lessee shall agree (a) to drill and produce all wells necessary to offset or protect the leased land from drainage by wells on adjoining lands not the property of the lessor, or in lieu thereof, compensate thelessor in full each month for the estimated loss of royalty through drainage; *Provided*, That during the period of supervision by the Secretary of the Interior, the necessity for offset wells shall be determined by the oil and gas supervisor and payment in lieu of drilling and producing shall be with the consent of, and in an amount determined by the Secretary of the Interior; (b) at the election of the lessee to drill and produce other wells; *Provided*, That the right to drill and produce such other wells shall be subject to any system of well spacing or production allotments authorized and approved under applicable law or regulations, approved by the Secretary of the Interior and affecting the field or area in which the leased lands are situated; and (c) if the lessee elects not to drill and produce such other wells for any period the Secretary of the Interior may, within 10 days after due notice in writing, either require the drilling and production of such wells to the number necessary, in his opinion, to insure reasonable diligence in the development and operations of the property, or may in lieu of such additional diligent drilling and production require the payment on and after the first anniversary date of this lease of not to exceed $1 per acre per annum, which sum shall be in addition to any rental or royalty hereinafter specified: *Provided*, That in the event oil or gas is discovered on the leased premises, the lessee shall proceed with all reasonable diligence to develop said premises and extract the oil or gas therefrom and bring same into the market as speedily as possible, unless the extraction and sale thereof be withheld with the consent of the Crow Indian tribal council.

CROSS REFERENCE: For oil and gas operating regulations of the Geological Survey, see 30 CFR Part 221.

§ 173.12 Diligence And Prevention Of Waste.

The lessee shall exercise reasonable diligence in drilling and operating wells for oil and gas on the lands covered hereby, while such products can be secured in paying quantities; carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the productive sands or oil or gas-bearing strata to the destruction or injury of the oil or gas deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; plug securely all wells before abandoning the same and to shut off effectually all water from the oil or gas-bearing strata; not drill any well within 200 feet of any house or barn on the premises without the lessor's written consent approved by the superintendent; carry out at his expense all reasonable orders and requirements of the oil and gas supervisor relative to prevention of waste, and the health and safety of workmen; bury all pipe lines crossing tillable lands below plow depth unless other arrangements therefor are made with the superintendent; pay the lessor all damages to crops, building, and other improvements of the lessor occasioned by the lessee's operations; *Provided*, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

§ 173.13 Payments.

(a) All payments due the lessor shall be made to the superintendent, for the benefit of the lessors, and no credit will be given any lessee for payments made otherwise. Payments of rentals and royalties under oil and gas leases, except the first year's rental which shall be paid to the superintendent as prescribed in § 173.4 shall be transmitted to the superintendent through the oil and gas supervisor. All such payments shall be accompanied by a statement, in triplicate, by the lessee, showing the specific items of royalty or rental that the remittance is intended to cover, and shall be made at such time or times as the lease provides.

(b) In the event of the discovery of minerals in paying quantities, all advance rental and royalty payments will be allowed as credit

on stipulated royalties for the year for which the payment is made. In the event the royalty on production for any year is not sufficient to equal the advance rental and royalties for that year, no refund will be made; nor will any part of the moneys so paid be refunded because of any subsequent surrender or cancellation of the lease, nor shall the lessee be relieved, by reason of any subsequent surrender or cancellation of the lease, from the obligation to pay said advance and royalty.

[22 FR 10596, Dec. 24, 1957, as amended at 24 FR 6342, Aug. 7, 1959]

§ 173.14 Royalty Rates; Oil And Gas Leases.

The lessee shall pay, beginning with the date of approval of oil and gas leases by the Secretary of the Interior, a rental of $1.25 per acre per annum in advance during the continuance thereof, together with a royalty of 12½ percent of the value or amount of all oil, gas, and/or natural gasoline, and/or all other hydrocarbon substances produced and saved from the land leased, save and except oil, and/or gas used by the lessee for development and operation purposes on the lease, which oil and/or gas shall be royalty free. A higher rate of royalty may be fixed by the Secretary of the Interior or his authorized representative, prior to the advertisement of land for oil and gas leases.

§ 173.15 Gas For Use Of Lessor.

If the leased premises produce gas in excess of the lessee's requirements for the development and operation of said premises the lessor may use sufficient gas, free of charge, for any desired school or other building belonging to the tribe, by making his own connections to a regular installed, connected to the well and maintained by the lessee, and the lessee shall not be required to pay royalty on gas so used. The use of such gas shall be at the lessor's risk at all times.

§ 173.16 Annual Rentals And Expenditures For Development On Mining Leases Other Than Oil And Gas.

The provisions of § 171.14 of this subchapter, or as hereafter amended, are applicable to leases under this part.

[24 FR 6342, Aug. 7, 1959]

§ 173.16a Suspension Of Operations And Production On Leases For Minerals Other Than Oil And Gas.

The provisions of § 171.14a of this subchapter are applicable to leases under this part.

24 FR 9511, Nov. 26, 1959]

§ 173.17 Royalty Rates For Minerals Other Than Oil And Gas.

Unless otherwise authorized by the Commissioner of Indian Affairs, the minimum rates for minerals other than oil and gas shall be as follows:

(a) For substances other than gold, silver, copper, lead, zinc, tungsten, coal, asphaltum and allied substances, oil, and gas, the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 percent of the value, at the nearest shipping point, of all ores, metals, or minerals marketed.

(b) For gold and silver the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less than 10 percent to be computed on the value of bullion as shown by mint returns after deducting forwarding charges to the point of sale; and for copper, lead, zinc, and tungsten, a royalty of not less than 10 percent to be computed on the value of ores and concentrates as shown by reduction returns after deducting freight charges to the point of sale. Duplicate returns shall be filed by the lessee with the Superintendent within 10 days after the ending of the quarter or other period specified in the lease within which such returns are made: *Provided, however,* That the lessee shall pay a royalty of not less than 10 percent of the value of the ore or concentrates sold at the mine unless otherwise provided in the lease.

(c) For coal the lessee shall pay quarterly or as otherwise provided in the lease a royalty of not less than 10 cents per ton of 2,000 pounds of mine run, or coal as taken from the mine, including what is commonly called "slack."

(d) For asphaltum and allied substances the lessee shall pay quarterly or as otherwise provided in the lease, a royalty of not less

than 10 cents per ton of 2,000 pounds on crude material or not less than 60 cents per ton on refined substances.

§ 173.18 Books Of Sales And Receipts Open To Inspection.

The lessee shall keep books of account showing the amount of ore shipped or oil or other mineral substance sold or treated, and showing also the amount of money received from the sale of ores, oil, etc. The books of the lessee shall be open to inspection, examination, and verification by any officer of the Interior and it is distinctly understood that the Government shall be permitted freely to make transcripts of all the accounts and other books of lessee.

§ 173.19 Manner Of Paying Royalties.

All royalties or payments due under leases under the regulations in this part shall be made by check or draft drawn on a solvent bank, open for the transaction of business on the day the check or draft is issued, or by other form of suitable exchange, to the order of the superintendent. All such payments except advance rentals for the first year, which, as provided in the regulations in this part, are to be paid to the superintendent at the time the leases are filed, shall be transmitted through the oil and gas supervisor, shall be accompanied by a statement by the lessee, in triplicate, showing the specific terms of rentals or royalty that the remittance is intended to cover and shall be made at such times as the lease provides.

§ 173.20 Division Orders.

(a) Lessees may make arrangements with the purchasers of oil for the payment of the royalties to the superintendent by such purchasers, but such arrangement, if made, shall not operate to relieve a lessee from responsibility should the purchaser fail or refuse to pay royalties when due. Where lessees avail themselves of this privilege, division orders permitting the pipe line companies or other purchasers of the oil to withhold the royalty interest shall be executed and forwarded to the oil and gas supervisor for approval, as pipe line comanies are not permitted to accept or run oil from leased Indian lands until after the approval of a division order showing that the lessee has a lease regularly approved an in effect. When the lessee

company runs its own oil, it shall execute and intracompany division order and forward it to the oil and gas supervisor for his consideration. The right is reserved for the oil and gas supervisor to cancel a division order at any time or require the pipe line company to discontinue to run the oil of any lessee who fails to operate the lease properly or otherwise violates the provisions of the lease, of the regulations in this part, or of the operating regulations.

(b) When oil is taken by authority of a division order, the lessee or his representative shall be actually present when the oil is gauged and records are made of the temperature, gravity, and impurities. The lessee will be held responsible for the correctness and the correct recording and reporting of all of the foregoing measurements; which, except lowest gauge, shall be made at the time the oil is turned into the pipe line. Failure of the lessee to perform properly these duties will subject the division to revocation.

CROSS REFERENCE: For oil and gas operating regulations of the Geological Survey, *see* 30 CFR Part 221.

§ 173.21 Assignments And Overriding Royalties

(a) Leases hereafter approved, or any interest therein, may be assigned or transferred only with the approval of the Secretary of the Interior, and to procure such approval the assignee must be qualified to hold such lease under existing rules and regulations, and shall furnish a satisfactory bond for the faithful performance of the covenants and conditions thereof.

(b) No lease or any interest therein or the use of such lease shall be sublet or transferred, directly or indirectly, by working or drilling contract or otherwise, without the consent of the Secretary of the Interior.

(c) Assignments of leases and stipulations modifying the terms of existing leases, which stipulations also require the approval of the Secretary of the Interior, shall be filed with the superintendent within 30 days after the date of execution.

(d) An agreement creating overriding royalties or payments out of production on oil and gas leases under this part shall be subject

to the provisions of § 171.26(d) of this subchapter, or as hereafter amended.

[22 FR 10596, Dec. 24, 1957, as amended at 23 FR 9758, Dec. 18, 1958]

§ 173.22 Cancellation.

When, before restrictions are removed, in the opinion of the Secretary of the Interior, the lessee has violated any of the terms and conditions of a lease or of the applicable regulations, the Secretary of the Interior shall have the right at any time after 30 days' notice to the lessee specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days after issuance of the notice, to declare such lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land: *Provided,* That after restrictions are removed the lessor shall have and be entitled to any available remedy in law or equity for breach of the contract by the lessee.

On the following conditions, the lessee may, on approval of the Secretary of the Interior, surrender a lease or any part of it:

(a) That he make application for cancellation to the superintendent having jurisdiction over the land.

(b) That he pay a surrender fee of $1 at the time the application is made.

(c) That he pay all royalties and rentals due to the date of such application.

(d) That he make a satisfactory showing that full provision has been made for conservation and protection of the property and that all wells, drilled on the portion of the lease surrendered, have been property abandoned.

(e) If the lease has been recorded, that he file, with his application, a recorded release of the acreage covered by the application.

(f) If the application is for the cancellation of the entire lease or the entire undivided portion, that he surrender the lease: *Provided,* That where the application is made by an assignee to whom no copy of

the lease was delivered, he will be required to surrender only his copy of the assignment.

(g) If the lease (or portion being surrendered or cancelled) is owned in the undivided interests by more than one party, then all parties shall join in the application for cancellation.

(h) That all required fees and papers must be in the mail or received on or before the date upon which rents and royalties become due in order for the lessee and his surety to be relieved from liability for the payment of such royalties and rentals.

(i) If there has been a contest respecting a lease or leases, the approved, the disapproved, or the canceled parts thereof will be held in the office of the superintendent for 5 days after the Department's decision has been promulgated by mail or delivery, and will not be delivered, if within that period a motion for review or reconsideration be filed, until such motion is passed upon by the Department.

(j) In the event oil or gas is being drained from the leased premises by wells not covered by a lease, the lease, or any part of it, may be surrendered, only on such terms and conditions as the Secretary of the Interior may determine to be reasonable and equitable.

No part of any advance rental shall be refunded to the lessee nor shall he be relieved, by reason of any subsequent surrender or cancellation of the lease, from the obligation to pay said advance rental when it becomes due.

§ 172.23 Mines To Be Timbered Properly.

In mining operations the lessee shall keep the mine well and sufficiently timbered at all points where necessary, in accordance with good mining practice and in such manner as may be necessary to the proper preservation of the property leased and safety of the workmen.

§ 173.24 Lessee And Surety Held Responsible For Return Of Premises In Good Condition.

On expiration of the term of a lease, or when a lease is surrendered, the lessee shall deliver to the Government the leased ground with the

mine workings in good order and condition, and bondsmen will be held for such delivery in good order and condition, unless relieved by the Secretary of the Interior with the consent of the tribal council. It shall, however, be stipulated that the machinery necessary to operate the mine is the property of the lessee, but that it may be removed by him only after the condition of the property has been ascertained, by inspection by the Secretary of the Interior or his authorized agents, to be in satisfactory condition.

§ 173.25 Wasteful Operations Not Permitted.

The Secretary of the Interior may, in his discretion, cancel any lease if the mining operations are conducted wastefully and without regard to good mining practice.

§ 173.26 Permission To Start Operations

(a) No operations will be permitted on any lease before it is approved by the Secretary of the Interior.

(b) Written permission must be secured from the supervisor before any operations are started on the leased premises. After such permission is secured the operations must be in accordance with the operating regulations promulgated by the Secretary of the Interior. Copies of operating regulations may be secured from either the supervisor or the Superintendent and no operations should be attempted without a study of the operating regulations.

§ 173.27 Penalties.

Failure of the lessee to comply with any provision of the lease, of the operating regulations, of the regulations in this part, order of the superintendent or his representative, or of the orders of the supervisor or his representatives, shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a penalty of not more than $500 per day for each and every day the terms of the lease, the regulations, or such orders are violated; or to both such penalty and cancellation: *Provided,* That the lessee shall be entitled to notice and hearing, within 30 days after such notice, with respect to the terms of the lease, regulations, or orders violated, which hearing shall be held

by the supervisor, whose findings shall be conclusive unless an appeal be taken to the Secretary of the Interior within 30 days after notice of the supervisor's decision and the decision of the Secretary of the Interior upon appeal shall be conclusive.

§ 173.28 Fees.

The provisions of § 171.25 of this chapter, or as hereafter amended, are applicable to this part.

[24 FR 7949, Oct. 2, 1959]

§ 173.29 Forms.

The provisions of § 171.30 of this chapter, or as hereafter amended, are applicable to this part.

[24 FR 7949, Oct. 2, 1959]

APPENDIX J

ACT OF MAY 29, 1924, 43 STAT. 244 [CODIFIED AT 25 U.S.C. §§ 398a *et seq.*].

§ 398a. Leases Of Unallotted Lands For Oil And Gas Mining Purposes Within Executive Order For Indian Reservations

Unallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for the use or occupancy of any Indians or tribe may be leased for oil and gas mining purposes in accordance with the provisions contained in the Act of May 29, 1924 (Forty-third Statutes, page 244) [25 USCS § 398].

(Mar. 3, 1927, c. 299, § 1, 44 Stat. 1347.)

§ 398b. Proceeds From Rentals, Royalties, And Bonuses — Disposition

The proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive order Indian reservations or withdrawals shall be deposited in the Treasury of the United States to the credit of the tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: Provided, That said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress.

(Mar. 3, 1927, c. 299, § 2, 44 Stat. 1347.)

§ 398c. Taxes

Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the

Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: Provided, That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

(Mar. 3, 1977, c. 299, § 3, 44 Stat. 1347.)

§ 398d. Changes In Boundaries Of Executive Order Reservations

Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: Provided, That this shall not apply to temporary withdrawals by the Secretary of the Interior.

(Mar. 3, 1927, c. 299 § 4, 44 Stat. 1347.)

§ 398e. Applications For Permits To Prospect For Oil And Gas Filed Under Other Statutes — Disposition

The Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to allow any person who prior to May 27, 1924, filed an application for a permit in accordance with the provisions of the Act of February 25, 1920 [30 USCS §§ 181-184, 185-188, 189-192, 193, 201, 202-209, 211-214, 223, 224-226, 226-2, 227-229a, 241, 251, 261-263], to prospect for oil and gas upon lands within an Indian reservation or withdrawal created by Executive order who shall show to the satisfaction of the Secretary of the Interior that he, or the party with whom he has contracted, has done prior to January 1, 1926, any or all of the following things, to wit, expended money or labor in geologically surveying the lands covered by such application, has built a road for the benefit of such lands, or has drilled or contributed toward the drilling of the geologic structure upon which such lands are located, or who in good faith has either filed a motion for reinstatement or rehearing; or performed any other act which in the judgment of the Secretary of the Interior entitles him to equitable relief, to prospect for a period of two years from [Mar. 3, 1927] the date this act takes effect, or for such further time as the Secretary of the Interior may deem reasonable or necessary for the full exploration of the land described in his application under the

terms and conditions therein set out, and a substantial contribution toward the drilling of the geologic structure thereon by such applicant for a permit thereon may be considered as prospecting under the provisions hereof; and upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil and gas have been discovered within the limits of the land embraced in any such application, he shall be entitled to a lease for one-fourth of the land embraced in the application: Provided, That the applicant shall be granted a lease for as much as one hundred and sixty acres of said lands if there be that number of acres within the application. The area to be selected by the applicant shall be in compact form and, if surveyed, to be described by the legal subdivisions of the public land surveyed; if unsurveyed, to be surveyed by the Government at the expense of the applicant for lease in accordance with rules and regulations to be prescribed by the Secretary of the Interior, and the lands leased shall be conformed to and taken in accordance with the legal subdivisions of such surveys; deposit made to cover expense of surveys shall be deemed appropriated for that purpose, and any excess deposits may be repaid to the person or persons making such deposit or their legal representatives. Such leases shall be for a term of twenty years upon a royalty of 5 per centum in amount or value of the production and the annual payment in advance of a rental of $1 per acre, the rental paid for any one year to be credited against the royalties as they may accrue for that year, with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior. The applicant shall also be entitled to a preference right to a lease for the remainder of the land in his application at a royalty of not less than 12½ per centum in amount or value of the production, the royalty to be determined by competitive bidding or fixed by such other methods as the Secretary of the Interior may by regulations prescribe: Provided further, That the Secretary of the Interior shall have the right to reject any or all bids.

(Mar. 3, 1927, c. 299 § 5, 44 Stat. 1347.)

APPENDIX K

ACT OF MARCH 3, 1927, CH. 299, 44 STAT. 1347, 25 U.S.C. §§ 398a-398e.

Chap. 299. — An Act To Authorize Oil And Gas Mining Leases Upon Unallotted Lands Within Executive Order Indian Reservations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That unallotted lands within the limits of any reservation or withdrawal created by Executive order for Indian purposes or for the use or occupancy of any Indians or tribe may be leased for oil and gas mining purposes in accordance with the provisions contained in the Act of May 29, 1924 (Forty-third Statutes, page 244).

SEC. 2. That the proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive order Indian reservations or withdrawals shall be deposited in the Treasury of the United States to the credit of the tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: *Provided,* That said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress.

SEC. 3. That taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury: *Provided,* That such taxes shall not become a lien or charge of any kind against the land or other property of such Indians.

SEC. 4. That hereafter changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress: *Provided*, That this shall not apply to temporary withdrawals by the Secretary of the Interior.

SEC. 5. That the Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to allow any person who prior to May 27, 1924, filed an application for a permit in accordance with the provisions of the Act of February 25, 1920, to prospect for oil and gas upon lands within an Indian reservation or withdrawal created by Executive order who shall show to the satisfaction of the Secretary of the Interior that he, or the party with whom he has contracted, has done prior to January 1, 1926, any or all of the following things, to wit, expended money or labor in geologically surveying the lands covered by such application, has built a road for the benefit of such lands, or has drilled or contributed toward the drilling of the geologic structure upon which such lands are located, or who in good faith has either filed a motion for reinstatement or rehearing; or performed any other act which in the judgment of the Secretary of the Interior entitles him to equitable relief, to prospect for a period of two years from the date this Act takes effect, or for such further time as the Secretary of the Interior may deem reasonable or necessary for the full exploration of the land described in his application under the terms and conditions therein set out, and a substantial contribution toward the drilling of the geologic structure thereon by such applicant for a permit thereon may be considered as prospecting under the provisions hereof; and upon establishing to the satisfaction of the Secretary of the Interior that valuable deposits of oil and gas have been discovered within the limits of the land embraced in any such application, he shall be entitled to a lease for one-fourth of the land embraced in the application: *Provided*, That the applicant shall be granted a lease for as much as one hundred and sixty acres of said lands if there be that number of acres within the application. The area to be selected by the applicant shall be in compact form and, if surveyed, to be described by the legal subdivisions of the public land surveyed; if unsurveyed, to be surveyed by the Government at the expense of the applicant for lease in accordance with rules and

regulations to be prescribed by the Secretary of the Interior, and the lands leased shall be conformed to and taken in accordance with the legal subdivisions of such surveys; deposit made to cover expense of surveys shall be deemed appropriated for that purpose, and any excess deposits may be repaid to the person or persons making such deposits may be repaid to the person or persons making such deposit or their legal representatives. Such leases shall be for a term of twenty years upon a royalty of 5 per centum in amount or value of the production and the annual payment in advance of a rental of $1 per acre, the rental paid for any one year to be credited against the royalties as they may accrue for that year, with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior. The applicant shall also be entitled to a preference right to a lease for the remainder of the land in his application at a royalty of not less than 12½ per centum in amount or value of the production, the royalty to be determined by competitive bidding or fixed by such other methods as the Secretary of the Interior may by regulations prescribe: *Provided further*, That the Secretary of the Interior shall have the right to reject any or all bids.

Approved, March 3, 1927.

APPENDIX L

THE INDIAN REORGANIZATION ACT OF 1934, 25 U.S.C. A §§ 461-479 (1976) PROVIDES IN PERTINENT PART:

§ 461. Allotment of land on Indian reservations

No land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian. June 18, 1934, c. 576, § 1, 48 Stat. 984.

§ 462. Existing periods of trust and restrictions on alienation extended

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress. June 18, 1934, c. 576, § 2, 48 Stat. 984.

§ 462a. Reimposition and extension of trust period on lands of Crow Reservation

Historical Note

§ 463. Restoration of lands to tribal ownership; protection of existing rights; Papago Indian Reservation

(a) The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation opened before June 18, 1934, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however*, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title. *Provided further*, That this section shall not apply to lands within any reclamation project authorized before June 18, 1934, in any Indian reservation.

(b) (1), (2) Repealed. May 27, 1955, c. 106 § 1, 69 Stat. 67.

(3) Water reservoirs, charcos, water holes, springs, wells, or any other form of water development by the United States or the Papago Indians shall not be used for mining purposes under the terms of sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479, of this title, except under permit from the Secretary of the Interior approved by the Papago Indian Council: *Provided*, That nothing herein shall be construed as interfering with or affecting the validity of the water rights of the Indians of this reservation: *Provided further*, That the appropriation of living water heretofore or hereafter affected, by the Papago Indians is hereby recognized and validated subject to all the laws applicable thereto.

(4) Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes. June 18, 1934, c. 576, § 3, 48 Stat. 984; Aug. 28, 1937, c. 866, 50 Stat. 862; May 27, 1955, c. 106, § 1, 69 Stat. 67.

§ 463e. Exchanges of land

For the purpose of effecting land consolidations between Indians and non-Indians within the reservation, the Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to acquire through purchase, exchange, or relinquishment, any interest in lands, water rights, or surface rights to lands within said reservation. Exchanges of lands hereunder shall be made on the basis of equal value and the value of improvements on lands to be relinquished to the Indians or by Indians to non-Indians shall be given due consideration and allowance made therefor in the valuation of lieu lands. This section shall apply to tribal, trust, or otherwise restricted Indian allotments whether the allottee be living or deceased. Aug. 10, 1939, c. 662, § 2, 53 Stat. 1351.

§ 463f. Title to lands

Title to lands or any interest therein acquired pursuant to sections 463d-463g of this title for Indian use shall be taken in the name of the United States of America in trust for the tribe or individual Indians for which acquired. Aug. 10, 1939, c. 662, § 3, 53 Stat. 1351.

§ 463g. Use of funds appropriated under section 465

For the purpose of carrying into effect the land-purchase provision of sections 463d-463g of this title, the Secretary of the Interior is hereby authorized to use so much as may be necessary of any funds heretofore or hereafter appropriated pursuant to section 465 of this title. Aug. 10, 1939, c. 662 § 4, 53 Stat. 1351.

§ 465. Acquisition of lands, water rights or surface rights, appropriation; title to lands; tax exemption

The Secretary of the Interior is hereby authorized, in his discretion to acquire, through purchase, relinquishment, gift exchange, or assignment, any interest in lands, water rights, or surface rights in lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation. June 18, 1934, c. 576, § 5, 48 Stat. 985.

§ 467. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority con-

ferred by sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations. June 18, 1934, c. 576, § 7, 48 Stat. 986.

§ 468. Allotments or holdings outside of reservations

Nothing contained in sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be construed to relate to Indian holdings of allotments or homesteads upon the public domain outside of the geographic boundaries of any Indian reservation now existing or established hereafter. June 18, 1934, c. 576, § 8, 48 Stat. 986.

§ 473. Application of sections

The provisions of sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478 and 479 of this title shall not apply to any of the Territories, colonies, or insular possessions of the United States, except that sections 469, 470, 471, 472, and 476 of this title shall apply to the Territory of Alaska: *Provided*, That Sections 462, 464, 467, 476, 477, and 478 of this title shall not apply to the following-named Indian tribes, the members of such Indian tribes, together with members of other tribes affiliated with such named tribes located in the State of Oklahoma, as follows: Cheyenne, Arapaho, Apache, Comanche, Kiowa, Caddo, Delaware, Wichita, Osage, Kaw, Otoe, Tonkawa, Pawanee, Ponca, Shawnee, Ottawa, Quapaw, Seneca, Wyandotte, Iowa, Sac and Fox, Kickapoo, Pottawatomi, Cherokee, Chickasaw, Choctaw, Creek, and Seminole. Section 464 of this title shall not apply to the Indians of the Klamath Reservation in Oregon. June 18, 1934, c. 576, § 13, 48 Stat. 986.

§ 476. Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or

of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, state, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, c. 576, § 16, 48 Stat. 987.

§ 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *provided,* That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the

reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress. June 18, 1934, c. 576, § 17, 48 Stat. 988.

§ 478. Acceptance of sections 461 to 479 optional

Sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice. June 18, 1934, c. 576, § 18, 48 Stat. 988.

§ 478a. Procedure

In any election heretofore or hereafter held under sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title, on the question of excluding a reservation from the application of the said sections or on the question of adopting a constitution and bylaws or amendments thereto or on the question of ratifying a charter, the vote of a majority of those actually voting shall be necessary and sufficient to effectuate such exclusion, adoption, or ratification, as the case may be: *Provided, however,* That in each instance the total vote cast shall not be less than 30 per centum of those entitled to vote. June 15, 1935, c. 260, § 1, 49 Stat. 378.

§ 478b. Laws, treaties and rights unaffected by passage of sections 461 to 479

All laws, general and special, and all treaty provisions affecting any Indian reservation which has voted or may vote to exclude itself from the application of sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said sections. Nothing in said sections shall be construed to abrogate or impair any rights guaranteed under any existing treaty with any Indian tribe, where such tribe voted not to exclude itself from the application of said sections. June 15, 1935, c. 260, § 4, 49 Stat. 378.

§ 479. Definitions

The term "Indian" as used in sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in said sections shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in said sections shall be construed to refer to Indians who have attained the age of twenty-one years. June 18, 1934, c. 576, § 19, 48 Stat. 988.

APPENDIX M

General Allotment Act of Feb. 8, 1887, 24 Stat. 388.

CHAP. 119. — An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be alloted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further,* That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in

quantity as specified in such treaty or act: *And provided further*, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. that all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided*, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the

same allotted to him or here, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And, provided further*, That at any

time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be unlawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided however*, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further*, That its patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three percent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres

in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chicka-

saws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands grant to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.

APPENDIX N

ACT OF MAY 26, 1926, CH. 403, 44 STAT. 658, IN PERTINENT PART PROVIDES:

CHAP. 403. — An Act To amend sections 1, 5, 6, and 18 of an Act approved June 4, 1920, entitled "An Act to provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first, fifth, sixth, eighth, and eighteenth sections of an Act providing for the allotment of lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes, approved June 4, 1920 (Forty-first Statutes at Large, pages 751-757), be amended to read as follows:

"SECTION 1. That the Secretary of the Interior be, and he hereby is, authorized and directed to cause to be allotted the surveyed lands and such unsurveyed lands as the commission hereinafter provided for may find to be suitable for allotment, within the Crow Indian Reservation in Montana (not including the Big Horn and Pryor Mountains, the boundaries whereof to be determined by said commission with the approval of the Secretary of the Interior), and not herein reserved as hereinafter provided, among the members of the Crow Tribe, as follows, namely, on hundred and sixty acres to the heirs of every enrolled member, entitled to allotment, who died unallotted after December 31, 1905, and before the passage of this Act; next, one hundred and sixty acres to every allotted member living at the date of the passage of this Act, who may then be the head of a family and has not received allotment as such head of a family; and thereafter to prorate the remaining unallotted allotable lands and allot them so that every enrolled member living on the date of the passage of this Act and entitled to allotment shall receive in the aggregate an equal share of the allotable tribal lands for his total allotment of land of the Crow Tribe. Allotments made hereunder shall vest title in the allottee subject only to existing tribal leases, which leases in no event shall be renewed or extended by the Secretary of the Interior after the passage of this Act, and shall as hereinafter provided

be evidenced by patents in fee to competent Indians, except as to homesteads as hereinafter provided, but by trust patent to minors and incompetent Indians, the force and legal effect of the trust patents to be as is prescribed by the General Allotment Act of February 8, 1887, as amended (Twenty-fourth Statutes at Large, page 388). Priority of selection, up to three hundred and twenty acres, is hereby given to the members of the tribe who have as yet received no allotment on the Crow Reservation, and thereafter all members enrolled for allotment hereunder shall in all respects be entitled to equal rights and privileges, as far as possible, in regard to the time, manner, and amount of their respective selections: *Provided*, That Crow Indians, who are found to be competent, may elect, in writing, to have their allotments, except as herein provided, patented to them in fee. Otherwise trust patents shall be issued to them. No patent in fee shall be issued for homestead lands of a husband unless the wife joins in the application, who shall be examined separately and apart from her husband and a certificate of the officer taking her acknowledgment shall fully set forth compliance with this requirement: *Provided further*, That any allottee classified as competent may lease his or her allotment or any part thereof and the allotments of minor children for farming and grazing purposes. Any adult incompetent Indian with the approval of the superintendent may lease his or her allotment or any part thereof and the allotments of minor children for farming or grazing purposes. The allotments of orphan minors shall be leased by the superintendent. Moneys received for or on behalf of all incompetent Indians and minor children shall be paid to the superintendent by the lessee for the benefit of said Indians. No lease shall be made for a period no longer than five years. All leases made under this section shall be recorded at the Crow Agency.

* * *

"SEC. 6. That any and all minerals, including oil and gas, on any of the lands to be allotted hereunder are reserved for the benefit of the members of the tribe in common and may be leased for mining purposes, with the consent of the tribal council under such rules, regulations, and conditions as the Secretary of the Interior may prescribe, but no lease shall be made for a longer period than ten years, but the lessees may have the right to renewal thereof for a

further period of ten years upon such terms and conditions as the Secretary of the Interior may prescribe, and agreed to by said tribal council: *Provided*, That when any land is leased for mining purposes and development thereunder shall indicate the presence of minerals including oil and gas in paying quantities, the lessee or lessees shall proceed with all reasonable diligence to complete the development under said lease to extract the mineral including oil and gas from the land leased and to bring the product mined or extracted into market as speedily as possible unless the extraction and sale thereof be withheld with the consent of the Crow Tribe of Indians: *Provided, however*, That allotments hereunder may be made of lands classified as valuable chiefly for coal or other minerals which may be patented as herein provided with a reservation, set forth in the patent, of the coal, oil, gas, or other mineral deposits for the benefit of the Crow Tribe: *And provided further*, That at the expiration of fifty years from the date of approval of this Act, unless otherwise ordered by Congress, the coal, oil, gas, or other mineral deposits upon or beneath the surface of said allotted lands shall become the property of the individual allottee or his heirs.

APPENDIX O

ACT OF MAY 19, 1926, CH. 338, 44 STAT. 566

CHAP. 338. — An Act To allot lands to living children on the Crow Reservation, Montana.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized to allot lands in severalty to children of the Crow Tribe, now living, not heretofore allotted, from any suitable lands belonging to the tribe now available for allotments, or which may become available, including any Crow lands heretofore opened to entry and sale: *Provided,* That the areas allotted shall be as authorized by the General Allotment Act of February 8, 1887 (Twenty-fourth Statutes at Large, page 388), as amended.

SEC. 2. All minerals, including oil and gas, on any of the lands allotted hereunder are reserved to the tribe, and may be leased for mining purposes in the same manner as other allotted lands of the reservation on which the mineral rights are so reserved: *Provided,* That the form of patent shall be as prescribed in the general allotment laws, and there shall be included therein all liens and other charges against these allotments the same as provided in the Crow Allotment Act of June 4, 1920 (Forty-first Statutes at Large, page 751).

SEC. 3. There is hereby authorized to be appropriated the sum of $5,000, or so much thereof as may be necessary, of the tribal funds of the Crow Indians of the State of Montana for surveys and other expenses connected with the allotments to be made hereunder.

Approved, May 19, 1926.

APPENDIX P

ACT OF SEPT. 16, 1959, 73 STAT. 565

An Act to grant minerals, including oil and gas, on certain lands in the Crow Indian Reservation, Montana, to certain Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 6 of the Act of June 4, 1920 (41 Stat. 751), as amended by the Act of May 26, 1926 (44 Stat. 658), is hereby amended to read as follows:

"Sec. 6. (a) Any and all minerals, including oil and gas, on any of the lands to be allotted hereunder are reserved for the benefit of the members of the tribe in common and may, with the consent of the tribal council, be leased for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396 a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe: *Provided*, That when any land is leased for mining purposes and development thereunder shall indicate the presence of minerals, including oil and gas, in paying quantities, the lessee or lessess shall proceed with all reasonable diligence to complete the development under said lease to extract the mineral, including oil and gas, from the land leased and to bring the product mined or extracted into market as speedily as possible unless the extraction and sale thereof be withheld with the consent of the Crow Tribe of Indians: *Provided further*, That allotments hereunder may be made of lands classified as valuable chiefly for coal or other minerals which may be patented as herein provided with a reservation, set forth in the patent, of the coal, oil, gas, or other mineral deposits for the benefit of the Crow Tribe: *Provided further*, That at the expiration of fifty years from the date of approval of this Act, unless otherwise ordered by Congress, the coal, oil, gas, or other mineral deposits upon or beneath the surface of said allotted lands shall become the property of the individual allottee or his heirs or devisees, or their heirs or devisees, subject to any outstanding leases, regardless of any prior conveyance by such allottee, heirs, or devisees of the lands overlying such

minerals and regardless of the form of reference in such conveyance, or lack of reference, to the minerals reserved by this Act and made subject to further order of Congress.

"(b) Title to the minerals so granted shall be held by the United States in trust for the Indian owners, except that if upon the expiration of said fifty years, the entire Indian interest in the minerals within any allotment or parcel thereof is granted by this Act to a person or persons who at that time hold an unrestricted title to the lands overlying such minerals, then the Secretary of the Interior shall be fee patent transfer to such person or persons the unrestricted fee simple title to such minerals, which title shall vest in such person or persons as of the date of the patent."

Approved September 16, 1959.

APPENDIX Q

ACT OF MAY 17, 1968, 82 STAT. 123

An Act to grant minerals, including oil and gas, on certain lands in the Crow Indian Reservation, Montana, to certain Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Section 6 of the Act of June 4, 1920 (41 Stat. 751), as amended by the Act of May 26, 1926 (44 Stat. 658), as further amended by the Act of September 16, 1959 (73 Stat. 565), is hereby amended to read as follows:

"Sec. 6. (a) Any and all minerals, including oil and gas, on any of the lands to be allotted hereunder are reserved in perpetuity for the benefit of the members of the tribe in common and may, with the consent of the tribal council be leased for mining purposes in accordance with the provisions of the Act of May 11, 1938 (52 Stat. 347; 25 U.S.C. 396a-f), under such rules, regulations, and conditions as the Secretary of the Interior may prescribe: *Provided*, That leases entered into pursuant to section 6 of the Act of June 4, 1920 (41 Stat. 751), as amended by the Act of May 26, 1926 (44 Stat. 658), may with the consent of the tribal council and under such rules, regulations, and conditions as the Secretary of the Interior may prescribe, be renegotiated and amended to change the terms thereof to ten years and as long thereafter as minerals are produced in paying quantities."

Approved May 17, 1968.

APPENDIX R

ACT OF MAY 19, 1958, 72 STAT. 121

An Act to provide for the restoration to tribal ownership of all vacant and undisputed of ceded lands on certain Indian reservations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

All lands now or hereafter classified as vacant and undisposed-of ceded lands (including townsite lots) on the following named Indian reservations are hereby restored to tribal ownership, subject to valid existing rights:

Reservation and State	Approximate Acreage
Klamath River, California	159.57
Coeur D'Alene, Idaho	12,877.65
Crow, Montana	10,260.65
Fort Peck, Montana	41,450.13
Spokane, Washington	5,451.00

Provided, That such restoration shall not apply to any lands while they are within reclamation projects heretofore authorized.

Sec. 2. Title to the lands restored to tribal ownership by this Act shall be held by the United States in trust for the respective tribe or tribes, and such lands are hereby added to and made a part of the existing reservations for such tribe or tribes.

Sec. 3. The lands restored to tribal ownership by this Act may be sold or exchanged by the tribe, with the approval of the Secretary of the Interior.

Approved May 19, 1958.

APPENDIX S

TREATY OF FORT LARAMIE OF 1851, 11 STAT. 749

Articles of the treaty made and concluded at Fort Laramie, in the Indian Territory, between D. D. Mitchell, superintendent of Indian affairs, and Thomas Fitzpatrick, Indian agent, commissioners specially appointed and authorized by the President of the United States, of the first part, and the chiefs, headmen, and braves of the following Indian nations, residing south of the Missouri River, east of the Rocky Mountains, and north of the lines of Texas and New Mexico, viz, the Sioux or Dahcotahs, Cheyennes, Arrapahoes, Crows, Assinaboines, Gros-Ventre Mandans, and Arrickarus, parties of the second part on the seventeenth day of September, A. D. one thousand eight hundred and fifty-one.

ARTICLE 1. The aforesaid nations, parties to this treaty, having assembled for the purpose of establishing and confirming peaceful relations amongst themselves, do hereby covenant and agree to abstain in future from all hostilities whatever against each other, to maintain good faith and friendship in all their mutual intercourse, and to make an effective and lasting peace.

ARTICLE 2. The aforesaid nations do hereby recognize the right of the United States Government to establish roads, military and other posts, within their respective territories.

ARTICLE 3. In consideration of the rights and privileges acknowledged in the preceding article, the United States bind themselves to protect the aforesaid Indian nations against the commission of all depredations by the people of the said United States, after the ratification of this treaty.

ARTICLE 4. The aforesaid Indian nations do hereby agree and bind themselves to make restitution or satisfaction for any wrongs committed, after the ratification of this treaty, by and band or individual of their people, on the people of the United States, whilst lawfully residing in or passing through their respective territories.

ARTICLE 5. The aforesaid Indian nations do hereby recognize and acknowledge the folloiwng tracts of country, included within the

metes and boundaries hereinafter designated, as their respective territories, 'viz:

The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Bute, or where the roads leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

The territory of the Gros Ventre, Mandans, and Arrickasas Nations, commencing at the mouth of Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the head-waters of the Little Missouri River; thence along the Black Hills to the head of Heart River, and thence down Heart River to the place of beginning.

The territory of the Assinaboin Nation, commencing at the mouth of Yellowstone River; thence up the Missouri River to the mouth of the Muscle-shell River; thence from the mouth of the Muscle-shell River in a southeasterly direction until it strikes the head-waters of Big Dry Creek; thence down that creek to where it empties into the Yellowstone River, nearly opposite the mouth of Powder River, and thence down the Yellowstone River to the place of beginning.

The territory of the Blackfoot Nation, commencing at the mouth of Muscle-shell River; thence up the Missouri River to its source; thence along the main range of the Rocky Mountains, in a southerly direction, to the head-waters of the northern source of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence across to the head-waters of the Muscle-shell River, and thence down the Muscle-shell River to the place of beginning.

The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind

River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth.

The territory of the Cheyennes and Arrapahoes, commencing at the Red Bute or the place where the road leaves the north fork of the Platte River, thence up the north fork of the Platte River to its source; thence along the main range of the Rocky Mountains to the head-waters of the Arkansas River; thence down the Arkansas River to the crossing of the Santa Fe' road; thence in a northwesterly direction to the forks of the Platte River, and thence up the Platte River to the place of beginning.

It is, however, understood that, in making this recognition and acknowledgment, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.

ARTICLE 6. The parties to the second part of this treaty having selected principals or head-chiefs for their respective nations through whom all national business will hereafter be conducted, do hereby bind themselves to sustain said chiefs and their successors during good behavior.

ARTICLE 7. In consideration of the treaty stipulations and for the damages which have or may occur by reason thereof to the Indian nations, parties hereto, and for their maintenance and the improvement of their moral and social customs, the United States bind themselves to deliver to the said Indian nations the sum of fifty thousand dollars per annum for the term of ten years, with the right to continue the same at the discretion of the President of the United States for a period not exceeding five years thereafter, in provisions, merchandise, domestic animals, and agricultural implements, in such proportions as may be deemed best adapted to their condition by the President of the United States, to be distributed in proportion to the population of the aforesaid Indian nations.

ARTICLE 8. It is understood and agreed that should any of the Indian nations, parties to this treaty, violate any of the provisions thereof, the United States may withhold the whole or a portion of the

annuities mentioned in the preceding article from the nation so offending, until in the opinion of the President of the United States, proper satisfaction shall have been made.

In testimony whereof the said D. D. Mitchell and Thomas Fitzpatric commissioners as aforesaid, and the chiefs, headmen, and braves, parties hereto, have set their hands and affixed their marks, on the day and at the place first above written.

D.D. Mitchell
Thomas Fitzpatrick
Commissioners.

Sioux:

Mah-toe-wha-you-whey, his x mark.
Mah-kah-toe-zah-zah, his x mark.
Bel-o-ton-kah-tan-ga, his x mark.
Nah-ka-pah-gi-gi, his x mark.
Mak-toe-sah-bi-chis, his x mark.
Meh-wha-tah-ni-hans-kah, his x mark

Cheyennes:

Wah-ha-nis-satta, his x mark.
Voist-ti-toe-vetz, his x mark.
Nahk-ko-me-ien, his x mark.
Koh-kay-y-wh-cum-est, his x mark.

Arrapahoes:

Be-ah-te-a-qui-sah, his x mark.
Neb-ni-bah-seh-it, his x mark.
Beh-kah-jay!beth-sah-es, his x mark.

In the presence of —

A. B. Chambers, secretary.
S. Cooper, colonel, U.S. Army.
R. H. Chilton, captain, First Drags.
Thomas Duncan, captain, Mounted Riflemen.
Thos. G. Rhett, brevet cap. R.M.R.
W. L. Elliott, first lieutenant R.M.R.
C. Campbell, interpreter for Sioux.
John S. Smith, interpreter for Cheyennes.
Robert Meldrum, interpreter for the Crows.

Crows:

Arra-tu-ri-sash, his x mark.
Doh-chepit-seh-chi-es, his x mark.

Assinaboines:

Mah-toe-wit-ko, his x mark.
Toe-tah-ki-eh-nan, His x mark.

Mandans and Gros Ventres:

Nochk-pit-shi-toe-pish, his x mark.
She-oh-mant-ho, his x mark.

Arickarecs:

Koun-hei-ti-shan, his x mark.
Bi-atch-tah-wetch, his x mark.

H. Culbertson, interpreter for Assiniboines and Gros Ventres.
Francois L'Etalie, interpreter for Arickarees.
John Pizelle, interpreter for the Arrapahoes.
B. Gratz Brown.
Robert Campbell.
Edmund F. Chouteau.

APPENDIX T

SECOND TREATY OF FORT LARAMIE OF 1868, 15 STAT. 649.

Articles of a treaty made and concluded at Fort Laramie, Dakota Territory, on the seventh day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and head-men of and representing the Crow Indians, they being duly authorized to act in the premises.

ARTICLE 1. From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it. If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they refuse willfully so to do the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating, or because of his violating, the provisions of this treaty or the laws of the United States shall be re-imbursed therefore.

ARTICLE 2. The United States agrees that the following district of country, to wit: commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning, shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth they will, and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

ARTICLE 3. The United States agrees, at its own proper expense, to construct on the south side of the Yellowstone, near Otter Creek, a warehouse or storeroom for the use of the agent in storing goods belonging to the Indians, to cost not exceeding twenty-five hundred dollars; an agency-building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission-building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

The United States agrees further to cause to be erected on said reservation, near the other buildings herein authorized, a good steam circular saw-mill, with a grist-mill and shingle-machine attached, the same to cost not exceeding eight thousand dollars.

ARTICLE 4. The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will made said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

ARTICLE 5. The United States agrees that the agent for said Indians shall in the future make his home at the agency-building; that he shall reside among them, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint, by and against the Indians, as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property, he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE 6. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered

to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Crow land book."

The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations and the internal police thereof, as may be thought proper.

ARTICLE 7. In order to insure the civilization of the tribe entering into this treaty, the necessity of education is admitted, especially by such of them as are, or may be, settled on said agricultural reservation; and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children, between said ages, who can be induced or compelled to attend school, a house shall be provided, and a teacher, competent to teach the elementary branches of an English education, shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

ARTICLE 8. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seed and agricultural implements for the first year in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seed and implements as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

ARTICLE 9. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house, on the reservation herein provided for, on the first day of September of each year for thirty years, the following article, to wit:

For each male person, over fourteen years of age, a suit of good substantial woolen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woolen socks.

For each female, over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotten domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woolen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent, each year, to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And, in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming, and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as, from time to time, the condition and necessities of the Indians may indicate to be proper. And if, at any time within the ten years, it shall appear that the amount of money needed for clothing under this article, can be appropriated to better uses for the tribe herein named, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery; and it is expressly stipulated that each Indian over the age of four years, who shall have removed to and

settled permanently upon said reservation, and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated that the United States will furnish and deliver to each lodge of Indians, or family of persons legally incorporated with them who shall remove to the reservation herein described, and commence farming, one good American cow and one good, wellbroken pair of American oxen, within sixty days after such lodge of family shall have so settled upon said reservation.

ARTICLE 10. The United States hereby agrees to furnish annually to the Indians the physican, teachers, carpenter, miller, engineer, farmer, and blacksmiths as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

ARTICLE 11. No treaty for the cession of any portion of the reservation herein described, which may be held in common, shall be of any force, or validity as against the said Indians unless executed and signed by, at least, a majority of all the adult male Indians occupying or interested in the same, and nocession by the tribe shall be understood or construed in such a manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him as provided in Article 6 of this treaty.

ARTICLE 12. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe who, in the judgment of the agent may grow the most valuable crops for the respective year.

W. T. Sherman,
Lieutenant-General.
Wm. S. Harney,
Brevet Major-General and Peace Commissioner.
Alfred H. Terry,
Brevet Major-General.

C. C. Augur,
Brevet Major-General.
John B. Sanborn.
S. F. Tappan.
Ashton S. H. White, Secretary.

Che-ra-pee-ssh-ka-te, Pretty Bull, his x mark.	[seal]
Chat-sta-he, Wolf Bow, his x mark.	[seal]
Ah-be-che-se, Mountain Tail, his x mark.	[seal]
Kam-ne-but-sa, Black Foot, his x mark.	[seal]
De-sal-ze-cho-se, White Horse, his x mark.	[seal]
Chin-ka-she-arache, Poor Elk, his x mark.	[seal]
E-sa-woor, Shot in the Jaw, his x mark.	[seal]
E-sha-chose, White Forehead his x mark.	[seal]
—Roo-ka, Pounded Meat, his x mark.	[seal]
De-ka-ke-up-se, Bird in the Neck, his x mark.	[seal]
Me-na-che, The Swan, his x mark.	[seal]

Attest:

George B. Willis, phonographer.
John D. Howland.
Alex. Gardner.
David Knox.
Chas. Freeman.
Jas. C. O'Connor.

APPENDIX U

CROW CESSION ACT OF APRIL 27, 1904, 33 STAT. 352

Chap. 1624. — An Act To Ratify And Amend An Agreement With The Indians Of The Crow Reservation In Montana, And Making Appropriations To Carry The Same Into Effect.

Whereas Benjamin F. Barge, James H. McNeely, and Charles G. Hoyt, acting for and on behalf of the United States, did, on the fourteenth day of August, A. D. eighteen hundred and ninety-nine, make and conclude an agreement with the Indians of the Crow Reservation, in Montana, which said agreement is in words and figures as follows:

Whereas Benjamin F. Barge, James H. McNeely, and Charles G. Hoyt, being duly appointed as commissioner[s] on behalf of the United States by the Secretary of the Interior under and by virtue of an act of Congress approved June 10th, 1896 (29 U.S. Statutes A. L., page 341), entitled "An act making apporpriations for current and contingent expenses of the Indian Bureau of the Interior Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June 30th, 1897, and for other purposes," and by said act being authorized to negotiate with the Crow Indians, in the State of Montana, for the cession of a portion of their reservation; and whereas the Indians residing on and having rights upon the said Crow Indian Reservation in the State of Montana are willing to dispose of a portion of their surplus lands:

Now therefore, this agreement made and entered into by and between the aforesaid commissioners on behalf of the United States of America and the head men and a majority of the male adults residing upon and having rights on the Crow Indian Reservation in the State of Montana, witnesseth:

ARTICLE I. That the said Indians of the Crow Reservation do hereby cede, grant, and relinquish to the United States all right, title, and interest which they may have to the lands embraced within and bounded by the following-described lines: Beginning at the northeast corner of the said Crow Indian Reservation; thence running due south to a point lying due east of the northeast corner of the Fort Custer

Military Reservation; thence running due west to the northwest corner of said Fort Custer Military Reservation; thence due south to the southwest corner of said Fort Custer Military Reservation; thence due west to the intersection of the line between sections ten and eleven, township two south, range twenty-eight east of the principal meridian of Montana; thence due north to the intersection of the Montana base line; thence due west to the intersection of the western boundary of the Crow Indian Reservation; thence in a northeasterly direction, following the present boundary of said reservation to point of beginning.

ARTICLE II. That in consideration of the land ceded, granted, and relinquished as aforesaid, the United States stipulates and agrees to pay to and expend for the Indians of the said reservation eleven hundred and fifty thousand dollars, in the following manner, to wit:

Ninety thousand dollars, or so much thereof as may be necessary shall be expended under the direction of the Secretary of the Interior in the extension and completion, including the necessary laterals of the system of irrigation now being constructed on said reservation.

Ten thousand dollars shall be expended under the direction of the Secretary of the Interior in the building, extension, or completion of individual Indian ditches: *Provided*, That none of the above sum shall be expended without the knowledge and consent of the Indian agent.

One hundred thousand dollars shall be placed in the Treasury of the United States to the credit of the Crow Indians as a trust fund, the same to remain in the Treasury for fifteen years, and shall draw interest at the rate of four percent per annum, said interest to be expended by the Secretary of the Interior in maintaining and managing said irrigation system.

Provided further, That at the expiration of the fifteen years above mentioned such disposition shall be made of said fund as the Indians, with the consent of the Secretary of the Interior, may determine.

Two hundred forty thousand dollars shall be expended, under the direction of the Secretary of the Interior in the purchase of two-year-old southern heifers, the same to be placed upon the Crow Indian Reservation, and added to the present herd now owned in common by the Crow tribe of Indians;

Additional amounts may be expended for cattle from time to time at the request of the Indians under the direction of the Secretary of the Interior.

Provided further, That during the year 1902 all cattle owned at that time in common by the Crow tribe of Indians shall be divided equally between said Indians, share and share alike to every man, woman, and child having rights upon the Crow Reservation.

Fifteen thousand dollars shall be spent in the purchase of jackasses or stallions, either or both, in the discretion of the Secretary of the Interior, the same to be placed upon the Crow Reservation for the benefit of the Crow Indians.

Forty thousand dollars shall be expended under the direction of the Secretary of the Interior in the purchase of two-year-old ewes, the same to be placed upon the Crow Reservation for the benefit of the Crow Indians.

Forty thousand dollars, or as much thereof as may be necessary, shall be expended by the Secretary of the Interior in fencing the Crow Reservation, said fence to be built of six strands of galvanized barbed cattle wire, with either cedar posts not less than four inches in diameter at the small end or iron posts set sixteen feet apart with three metallic stays between each two posts; said fence to be well built and properly braced and anchored.

One hundred thousand dollars, or as much thereof as may be necessary, shall be expended by the Secretary of the Interior in the erection, purchase and repair of such school buildings as he may deem necessary.

Ten thousand dollars shall be expended by the Secretary of the Interior, in the erection and furnishing of a hospital at the agency for the benefit of the Crow Indians.

Fifty thousand dollars shall be placed in the Treasury of the United States to the credit of the Crow tribe of Indians as a trust fund, and shall bear interest at the rate of four percent per annum; said interest to be used, under direction of the Secretary of the Interior, to cover necessary expenses of maintaining said hospital.

Fifty thousand dollars shall be deposited in the Treasury of the United States to the credit of the Crow tribe of Indians, the same to be expended for their benefit from time to time by the Secretary of the Interior, in such manner as he may direct.

Three thousand dollars, or as much thereof as may be necessary, is hereby appropriated and set apart to pay the expenses of ten Crow Indians, two interpreters and the agent to visit Washington at such time as permission is received from the Secretary of the Interior.

The balance of the principal sum due the Crow Indians under this agreement shall be placed in the Treasury of the United States to their credit as a trust fund and shall bear interest at the rate of four percent per annum; said interest to be added annually to the principal and an annual annuity payment of twelve dollars per capita shall be paid, in cash, to every man, woman and child having rights upon the reservation; said annuity to be semiannually in accordance with such rules and regulations as the Secretary of the Interior may prescribe.

Provided further, That two hundred thousand dollars of the last-named sum may be expended in the further purchase of cattle or sheep should a majority of the Indians so decide, and the same be approved by the Secretary of the Interior.

Provided further, That when each object for which a specific appropriation has been made in this agreement shall have been fully carried out and completed then the balance remaining of said appropriation may be expended for the benefit of the Crow tribe or placed to their credit in such manner as the Secretary of the Interior may determine.

It is further agreed that in the construction of ditches, dams, canals and fences that no contract shall be awarded; nor employment given to other than Crow Indians, or whites intermarried with them, except that any Indian employed in construction may hire white men to work for him if he so desires.

Provided further, That nothing herein contained shall be construed to prevent the employment of such engineers or other skilled employees, or to prevent the employment of white labor where it is impracticable for the Crows to perform the same.

None of the money due to the said Indians under this agreement shall be subject to the payment of any claims, judgments, [or] demands against said Indians for damages or depredations claimed to have been committed prior to the signing of this agreement.

ARTICLE III. All lands upon that portion of the reservation hereby granted, ceded and relinquished which have, prior to the date of this agreement been allotted in serveralty to Indians of the Crow tribe shall be reserved for said Indians, or where any Indians have homes on such lands they shall not be removed therefrom without their consent, and those not allotted may receive allotments on the lands they now occupy. But in case any prefer to move they may select land elsewhere on that portion of said reservation not hereby ceded granted or relinquished, and not occupied by any other Indians, and should they decide not to move their improvements, then the same may be sold for their benefit, said sale to be approved by the Secretary of the Interior, and the cash proceeds shall be paid to the Indian or Indians whose improvements shall be so sold.

ARTICLE IV. That for the purpose of segregating the ceded lands from the diminished reservation the new boundary lines described in Article I of this agreement shall, when necessary be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, the cost of said survey to be paid by the United States.

ARTICLE V. The water from streams on that portion of the reservation now sold, which is necessary for irrigating on land actually cultivated, and in use, shall be reserved for the Indians now using the same so long as said Indians remain where they now live.

ARTICLE VI. It is further agreed that a statement of all expenditures under the various provisions of this agreement shall be sent to the agent of the Crow Indians twice a year, or at such times as the Secretary of the Interior may direct, showing the amounts expended and the balance remaining on hand in each of the several funds.

ARTICLE VII. The existing provisions of all former treaties with the Crow tribe of Indians not inconsistent with the provisions of this

agreement, are hereby continued in force and effect, and all provisions thereof inconsistent herewith are hereby repealed.

ARTICLE VIII. This agreement shall take effect and be in force when signed by the commissioners and a majority of the male Indians of the Crow tribe over eighteen years of age, and ratified by the Congress of the United States, and should any article in the agreement fail of confirmation by Congress, then the whole shall be null and void.

Signed on the part of the United States Government by the commissioners aforesaid and by the following Indians of the Crow tribe having rights on the Crow Reservation in the State of Montana.

CROW AGENCY, MONTANA, August 14, 1899:

CHARLES G. HOYT, Commissioner.
JAMES H. MCNEELY, Commissioner.
BENJAMIN F. BARGE, Commissioner.
PRETTY (x mark) EAGLE.
PRETTY COOS.
Two (x mark) LEGGINS.
(And 535 others.)

Witness: FRED E. MILLER

I hereby certify that I was chosen, by the Indians to act as interpreter during the councils held to discuss the foregoing agreement; that I truly interpreted for the commissioners and for the Indians, and that they thoroughly understand the entire matter.

CARL LEIDER, Interpreter.

Witness: C. N. CROTSENBURG.

We hereby certify that we were present at the councils held to discuss the foregoing agreement; that we understand the Crow language, and that the provisions of this agreement were correctly interpreted to the Indians, and that they understood the entire matter.

FRANK SHANE.
W. M. LEIGHTON.
GEORGE H. PEASE.

Witnesses:
H. J. SHOBE.
F. G. MATTOON.

CROW AGENCY, MONT., August 14, 1899.

CROW AGENCY, MONT., August 14, 1899.

I hereby certify that three hundred and seventeen Indians constitute a majority of the male adult Indians over 18 years old residing on, or having rights upon the Crow Indian Reservation, in the State of Montana.

J. E. EDWARDS, United States Indian Agent.

And

Whereas: The Indians of said Crow Reservation consented to the modification of the aforesaid agreement, as evidenced by an instrument executed by them on the twenty-seventh day of April, A. D. nineteen hundred and one, in words and figures as follows:

CROW AGENCY, MONTANA, April 27, 1901.

We, the undersigned members of the Crow Tribe of Indians, hereby consent and agree to the amendment of an agreement concluded with our tribe August 14th, 1899, by the addition of the following article thereto: Article IX. The right to take out water upon the diminished reservation subject to any prior claim of the Indians thereto by reason of previous appropriation, and the right to construct, maintain, and operate dams, flumes, and canals upon and across the said diminished reservation for the purpose of irrigating lands within any portion of the ceded tract, are hereby granted, such rights to be exercised by persons, companies, or corporations under such rules, regulations, and requirements as may be prescribed by the Secretary of the Interior.

RICHARD WALLACE X
TWO LEGGINS X
MEDICINE EAGLE X
(and 523 more Indian signatures.)

We certify on honor that we were present and witnessed the signing of the above agreement by the adult male members of the Crow Tribe of Indians, numbered from 1 to 526.

F. G. MATTOON.
FRED E. MILLER.

I certify on honor that I interpreted the above amendments to the agreement, and the succeeding agreement, for the Indians and that they fully understood the conditions of the same, and that I witnessed the signing of same by the adult male members of the Crow Tribe of Indians, numbered from 1 to 526.

T. LAFORGE, Interpreter.

I certify on honor that the Indians whose names are attached to the above list, number from one (1) to five hundred twenty-six (526) are all adult male members of the Crow Tribe of Indians, and that each one is entitled to and does receive an equal portion of the benefits of the Crow Tribe of Indians, and are entitled to signify their willingness to the above undertaking. I further certify that three hundred twenty-three (323) Indians constitute a majority of the adult male Crow Indians having rights on the Crow Indian Reservation in the State of Montana.

J.E. EDWARDS, U.S. Indian Agent.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreement be, and the same is hereby, modified and amended to read as follows:

"ARTICLE I. That the said Indians of the Crow Reservation do hereby cede, grant, and relinquish to the United States all right, title, and interest which they may have to the lands embraced within and bounded by the following-described lines: Beginning at the northeast corner of the said Crow Indian Reservation; thence running due south to a point lying due east of the northeast corner of the Fort Custer

Military Reservation; thence running due west to the northwest corner of said Fort Custer Military Reservation; thence due south to the southwest corner of said Fort Custer Military Reservation; thence due west to the intersection of the line between sections ten and eleven, township two south, range twenty-eight east of the principal meridian of Montana; thence due north to the intersection of the Montana base line; thence due west to the intersection of the western boundary of the Crow Indian Reservation; thence in a northeasterly direction, following the present boundary of said reservation to point of beginning.

"ART. II. That in consideration of the land ceded, granted, relinquished, and conveyed by article one of this agreement the United States stipulates and agrees to dispose of the same as hereinafter provided under the provisions of the reclamation act approved June seventeenth, nineteen hundred and two, the homestead, town-site, and mineral land laws, except sections sixteen and thirty-six, or an equivalent of two sections in each township, at not less than four dollars per acre, subject to the provisions in section five, the United States to pay for sections sixteen and thirty-six, or an equivalent of two sections in each township, at one dollar and twenty-five cents per acre, and to pay the said Indians the proceeds derived from the sale of said lands, and for the said sections sixteen and thirty-six, or an equivalent of two sections in each township, as follows:

"Ninety thousand dollars, or so much thereof as may be necessary, shall be expended, under the direction of the Secretary of the Interior, in the extension and completion, including the necessary laterals, of the system of irrigation now being constructed on said reservation.

"One hundred thousand dollars shall be placed in the Treasury of the United States to the credit of the Crow Indians as a trust fund, the same to remain in the Treasury for fifteen years and shall draw interest at the rate of four percentum per annum, said interest to be expended by the Secretary of the Interior in maintaining and managing said irrigation system: *Provided further*, That at the expiration of the fifteen years above mentioned such disposition shall be made of said funds as the Indians, with the consent of the Secretary of the Interior, may determine.

"Two hundred and forty thousand dollars shall be expended, under the direction of the Secretary of the Interior, in the purchase of

two-year-old Southern heifers, the same to be placed upon the Crow Indian Reservation and added to the present herd now owned in common by the Crow Tribe of Indians.

"Additional amounts may be expended for cattle from time to time, at the request of the Indians, under the direction of the Secretary of the Interior.

"Fifteen thousand dollars shall be spent in the purchase of jackasses or stallions, either or both, in the discretion of the Secretary of the Interior, the same to be placed upon the Crow Reservation for the benefit of the Crow Indians.

"Forty thousand dollars shall be expended under the direction of the Secretary of the Interior in the purchase of two-year-old ewes, the same to be placed upon the Crow Reservation for the benefit of the Crow Indians.

"Forty thousand dollars, or as much thereof as may be necessary, shall be expended by the Secretary of the Interior in fencing the Crow Reservation, said fence to be built of six strands of galvanized barbed cattle wire, with either cedar posts not less than four inches in diameter at the small end or iron posts set sixteen feet apart, with three metallic stays between each two posts; said fence to be well built and properly braced and anchored.

"One hundred thousand dollars, or as much thereof as may be necessary, shall be expended by the Secretary of the Interior in the erection, purchase, and repair of such school buildings as he may deem necessary.

"Ten thousand dollars shall be expended by the Secretary of the Interior in the erection and furnishing of a hospital at the agency for the benefit of the Crow Indians.

"Fifty thousand dollars shall be placed in the Treasury of the United States to the credit of the Crow tribe of Indians as a trust fund, and shall bear interest at the rate of four percentum per annum; said interest to be used, under the direction of the Secretary of the Interior, to cover necessary expenses of maintaining said hospital.

"Fifty thousand dollars shall be deposited in the Treasury of the United States to the credit of the Crow tribe of Indians, the same to be expended for their benefit from time to time by the Secretary of the Interior, in such manner as he may direct.

"Three thousand dollars, or as much thereof as may be necessary may be expended to pay the expenses of ten Crow Indians, two interpreters, and the agent to visit Washington at such time as permission is received from the Secretary of the Interior: *Provided further*, That should the funds accruing to the Indians from the sale of their lands render it advisable, the Secretary of the Interior may expend the further sum of two hundred thousand dollars in the further purchase of cattle or sheep, should a majority of the Indians so decide and the same be approved by the Secretary of the Interior: *Provided further*, That when each object for which a specific appropriation has been made in this agreement shall have been fully carried out and completed then the balance remaining of said appropriation may be expended for the benefit of the Crow tribe or placed to their credit in such manner as the Secretary of the Interior may determine: *Provided further*, That the Secretary of the Interior may, in his discretion, while the funds for the several purposes above named are accruing from the sale and disposition of the lands, make per capita cash payments from the proceeds at such times and in such amounts to every man, woman and child, share and share alike, having tribal rights on the reservation, as he may deem for their best interests.

"It is further agreed that in the construction of ditches, dams, canals, and fences no contract shall be awarded nor employment given to other than Crow Indians or whites intermarried with them except that any Indian employed in construction may hire white men to work for him if he so desires: *Provided further*, That nothing herein contained shall be construed to prevent the employment of such engineers or other skilled employees, or to prevent the employment of white labor where it is impracticable for the Crows to perform the same.

"That none of the money due to the said Indians under this agreement shall be subject to the payment of any claims, judgments, or demands against said Indians for damages or depredations claimed to

have been committed prior to the signing of this agreement. And the various expenditures and payments required to be made under the provisions of this article shall be made as the funds therefor are available as herein provided, and shall be prorated, apportioned, and made in such proportions and amounts as in the opinion of the Secretary of the Interior the needs and requirements of the Indians and their best interests shall warrant and demand.

"ART. III. All lands upon that portion of the reservation hereby granted, ceded, and relinquished which have, prior to the date of this agreement, been allotted in severalty to Indians of the Crow tribe shall be reserved for said Indians, or where any Indians have homes on such lands they shall not be removed therefrom without their consent, and those not allotted may receive allotments on the lands they now occupy. But in case any prefer to move they may select land elsewhere on that portion of said reservation not hereby ceded, granted, or relinquished, and not occupied by any other Indians, and should they decide not to move their improvements, then the same may be sold for their benefit, said sale to be approved by the Secretary of the Interior, and the cash proceeds shall be paid to the Indian or Indians whose improvements shall be so sold.

"ART. IV. That for the purpose of segregating the ceded lands from the diminished reservation the new boundary lines described in Article I of this agreement shall, when necessary be properly surveyed and permanently marked in a plain and substantial manner by prominent and durable monuments, the cost of said survey to be paid by the United States.

"ART. V. The water from streams on that portion of the reservation now sold, which is necessary for irrigating land actually cultivated and in use shall be reserved for the Indians now using the same so long as said Indians remain where they now live.

"ART. VI. It is further agreed that a statement of all expenditures under the various provisions of this agreement shall be sent to the agent of the Crow Indians twice a year, or at such times as the Secretary of the Interior may direct, showing the amounts expended and the balance remaining on hand in each of the several funds.

"ART. VII. The existing provisions of all former treaties with the Crow tribe of Indians not inconsistent with the provisions of this agreement are hereby continued in force and effect, and all provisions thereof inconsistent herewith are hereby repealed.

"ART. VIII. The right to take out water upon the diminished reservation subject to any prior claim of the Indians thereto by reason of previous appropriation, and the right to construct, maintain, and operate dams, flumes, and canals upon and across the said diminished reservation for the purpose of irrigating lands within any portion of the ceded tract are hereby granted, such rights to be exercised by persons, companies, or corporations under such rules, regulations, and requirements as may be prescribed by the Secretary of the Interior.

"ART. IX. This agreement shall take effect and be in force when accepted and ratified by the Congress of the United States."

SEC. 2. That the said agreement be, and the same is hereby, accepted, ratified, and confirmed, as herein amended.

SEC. 3. That for the purpose of surveying and marking so much of the boundary line of the tract ceded and relinquished by the Indians as may be necessary to segregate the same from the lands reserved by them, as provided in article four of said agreement, the sum of one thousand two hundred dollars, or so much thereof as may be necessary, be, and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated, and there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of forty thousand dollars, or so much thereof as may be necessary, for the completion of the survey and subdivision of said ceded lands, the same to be reimbursed out of the first moneys to be received from the sale of said lands.

SEC. 4. That the Commissioner of Indian Affairs shall cause allotments to be made, in manner and quantity as provided by existing law, of the lands occupied and cultivated by any Indians on the portion of the reservation by said agreement ceded and relinquished, as required by article three thereof; and where such Indian occupants elect to remove to the diminished reservation he shall cause a sched-

ule to be prepared showing the names of such occupants, the descriptions of the lands, and the character of the improvements thereon. Such improvements shall then be appraised and sold under the direction of the Secretary of the Interior to the highest bidder, no sale to be for less than the appraised value, the proceeds to be paid to the respective Indian occupants as required by said article three: *Provided*, That the purchaser of such improvements shall have a preference right, if otherwise qualified, of thirty days after the land becomes subject to entry within which to enter the lands upon which the improvements are located, not exceeding one hundred and sixty acres, in compliance with the provisions herein governing the disposition of said ceded lands.

The Secretary of the Interior shall fix a reasonable time within which such Indian occupants shall elect whether they will remain on the ceded tract or remove to the diminished reservation, and where they elect to remove he shall also fix a reasonable time within which such occupants must remove their improvements if they should choose to do so instead of having the same appraised and sold.

SEC. 5. That before any of the lands by this agreement ceded are opened to settlement or entry the Commissioner of Indian Affairs shall cause the allotments to be made and the schedule to be prepared, as provided for in section four of this act, and a duplicate of said schedule shall be filed with the Commissioner of the General Land Office. Upon the completion of such allotments and the filing of such schedule and after the sale or removal of such improvements the residue of such ceded lands, except sections sixteen and thirty-six, or lands in lieu thereof, which shall be reserved for common school purposes, and are hereby granted to the State of Montana for such purpose, shall be subject to withdrawal and disposition under the reclamation act of June seventeenth, nineteen hundred and two, so far as feasible irrigation projects may be found therein. The charges provided for by said reclamation act shall be in addition to the charge of four dollars per acre for the land, and shall be paid in annual installments as required under the reclamation act; and the amounts to be paid for the land shall be credited to the funds herein established for the benefit of the Crow Indians. If any lands in sections sixteen and thirty-six are included in an irrigation project under the reclamation

act, the State of Montana may select in lieu thereof, as herein provided, other lands not included in any such project, in accordance with the provisions of existing law concerning school land selections. In any construction work upon the ceded lands performed directly by the United States under the reclamation act, preference shall be given to the employment of Crow Indians, or whites intermarried with them, so far as may be practicable: *Provided, however,* That if the lands withdrawn under the reclamation act are not disposed of within five years after the passage of this act, then all of said lands so withdrawn shall be disposed of as other lands provided for in this act. That the lands not withdrawn for irrigation under said reclamation act, which lands shall be determined under the direction of the Secretary of the Interior at the earliest practical date, shall be disposed of under the homestead, town-site, and mineral-land laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation, until after the expiration of sixty days from the time when the same are opened to settlement and entry: *Provided,* That as to the lands open under such proclamation the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *And provided further,* That the price of said lands shall be four dollars per acre, when entered under the homestead laws, to be paid as follows:

One dollar per acre when entry is made, and the remainder in four equal annual installments, the first to be paid at the end of the second year.

In addition to the price to be paid for the land, the entrymen shall pay the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre.

Lands entered under the town-site and mineral-land laws shall be paid for in amount and manner as provided by said laws, but in no event at a less price than that fixed herein for such lands, if entered under the homestead laws, and in case any entryman fails to make such deferred payments, or any of them, promptly when due, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be held for cancellation and canceled: *Provided*, That the lands embraced within such canceled entry shall, after cancellation of such entry, be subject to entry under the provisions of the homestead law at four dollars per acre until otherwise directed by the President, as herein provided: *And provided*, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for payments previously made, except as to lands entered under said reclamation act: *And provided further*, That when, in the judgment of the President, no more of the land herein ceded can be disposed of at said price, he may by proclamation, to be repeated at his discretion, sell from time to time the remaining land subject to the provisions of the homestead law or otherwise as he may deem most advantageous, at such price or prices, in such manner, upon such conditions, with such restrictions, and upon such terms as he may deem best for all the interests concerned.

SEC. 6. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and paid to the Crow Indians or expended on their account only as provided in article two of said agreement as herein amended.

No lands in sections sixteen and thirty-six now occupied, as set forth in article three of the agreement herein ratified, or withdrawn for irrigation under the provisions of said reclamation act, shall be reserved for school purposes, but the State of Montana shall be entitled to indemnity for any lands so occupied; and the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized in the tract herein ceded to locate other lands not occupied or withdrawn, which shall be paid for by the United States, as herein provided, in quantity equal to the loss, and such selections shall be

made prior to the opening of such lands to settlement, but no selection shall be made by the State of the lands herein ceded except to compensate for losses occurring therein.

SEC. 7. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of ninety thousand dollars, or so much thereof as may be necessary, to pay the said Indians, at the rate of one dollar and twenty-five cents per acre, for the lands granted to the State of Montana as provided in section five of this act.

SEC. 8. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six or the equivalent in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received, as herein provided.

Approved, April 27, 1904.

Opposition

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No. 81-1852

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF MONTANA, and RAMON DORE, Director
Montana Department of Revenue,

Petitioners,

v.

CROW TRIBE OF INDIANS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT CROW TRIBE OF INDIANS IN OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether the Court of Appeals erred in ordering a trial to determine the validity of Montana's 30% severance tax and gross proceeds tax as applied to the production of coal located within the boundaries of the Crow Indian Reservation or owned by the Crow Tribe.

LIST OF PARTIES

This case was brought by the Crow Tribe of Indians and several officers and members of the Tribe against the State of Montana, the Director of the Montana Department of Revenue, and the Treasurers and Assessors of three Montana Counties, Big Horn, Yellowstone, and Treasure. Westmoreland Resources, Inc., intervened as a defendant. The three county assessors were subsequently dismissed without objection. Pet. App. 16a. The district court's dismissal of the claims of the individual tribal officers and members (Pet. App. 33a) was not appealed.

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BRIEF FOR RESPONDENT CROW TRIBE OF INDIANS IN OPPOSITION

ADDITIONAL PROVISIONS INVOLVED

In addition to the statutes and constitutional provisions quoted and cited in the Petition and those that are reproduced in the Appendix to the Petition, Article I, Section 8, Clause 3 of the United States Constitution empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian tribes."

STATEMENT OF THE CASE

Vast deposits of low sulphur coal underlie the Crow Indian Reservation and the ceded area adjacent to the Reservation in southeastern Montana. Virtually all of this coal is owned by the

United States in trust for the Crow Tribe. Pet. App. 13a, 34a-35a.

Since 1967, the Crow Tribe, with the encouragement and support of the Interior Department, has been actively engaged in the development of its coal resources pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, and the implementing regulations, 25 C.F.R. §§ 171.1 *et seq*. Several prospecting permits were issued from 1968 to 1970. In 1972, the Tribe entered into two leases for the development of coal in the ceded strip with Westmoreland Resources which were substantially revised in 1974. Westmoreland began producing coal from one of its leases in 1975; the other lease has recently been cancelled by mutual consent of Westmoreland and the Tribe with the approval of the Interior Department. So far, Westmoreland has been the only commercial producer of Crow coal. Pet. App. 13a-14a, 35a. In 1980, the Tribe entered into a lease with the Shell Oil Company for the development of tribally owned coal within the reservation. Approval of this lease is currently pending before the Interior Department. [1]

In 1975, Montana enacted a severance tax on each ton of coal produced in the State and a gross proceeds tax on the sale each ton of coal produced in the State. MCA 15-35-101 through 15-35-111; MCA 15-23-701 through 15-23-704. The rate of the severance tax on most, if not all, of the Crow coal is 30%. From the time Montana's taxes went into effect in 1975 until the Ninth Circuit's decision in July 1981, Westmoreland had paid $30,000,000 in taxes to Montana, almost 4 times more than the $8,000,000 in royalties that was paid to the Crow Tribe during this period. Pet. 8; Pet. App. 35a-36a.

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[1] The lease provides for the Tribe to be paid a 12½% royalty. The royalties are renegotiated every ten years. Shell has also agreed to pay the Tribe "an amount equal to the Montana State severance tax existing at the time . . . less whatever is required to be paid to the State of Montana."

In 1978, the Tribe brought suit challenging the validity of Montana's severance and gross proceeds taxes as applied to tribally owned coal. The Tribe's Amended Complaint (Pet. App. 1a-11a) alleges: that the Tribe is the beneficial owner of approximately 6 billion tons of coal; that the development of tribal coal offers an unprecedented opportunity for the Crow people to improve their severely depressed economic situation; that the imposition, assessment, and collection of the state severance and gross proceeds taxes have imposed a direct and severe burden on the Tribe in that the taxes are a direct and major cost associated with the production of Crow coal; that the consequences of the state taxes have been drastically increased costs to purchasers of Crow coal, correspondingly severe restrictions on the royalty payments to the Tribe, frustration of the Tribe's effort to renegotiate its leases with Westmoreland, and severe adverse effects on the competitive status of Crow coal; and that the state taxes have prevented the Tribe from realizing the full value and benefit of its coal, severely infringed the right and ability of the sovereign Crow Tribe to govern itself and its people, and severely impaired the Tribe's ability to serve its people through various programs and governmental services. Pet. App. 5a, 6a, 8a, 9a.

The district court dismissed the Tribe's action for failure to state a claim upon which relief can be granted. The court reasoned that Montana's taxes were imposed on the producers of the coal rather than on the Tribe or on tribal trust assets. Pet. App. 19a. Accordingly, the district court held that express congressional authorization for the state taxes was not required. Pet. App. 19a-22a. The district court also ruled "as a matter of law" that "the remote economic effect" of Montana's taxes on the Tribe is insufficient to constitute an interference with Crow tribal self-government, Pet. App. 25a, and that Montana's

taxes have not been preempted by federal law or the Tribe's own severance tax, Pet. App. 25a-28a. The district court stated:

> As the taxes in issue are assessed solely against Westmoreland, a non-Indian entity, and are in fact assessed solely against Westmoreland's personality — severed coal and gross proceeds from coal — it is inconceivable that any infringement upon Indian rights has been worked. . . .
>
> * * * * *
>
> [P]laintiffs can prove no set of facts in support of their four enumerated claims which would entitle them to the requested relief.

Pet. 30a.

The court of appeals reversed and remanded the case for trial. Following the approach and the reasoning of this Court's opinions in two cases decided after the district court's order of dismissal, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980); and *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the appellate court rejected the district court's conclusion that state taxes imposed against non-Indian entities are automatically valid. Pet. App. 38a-40a. *See, also*, Pet. App. 48a, 52a-53a. Instead, courts must undertake " 'a particularized inquiry into the nature of the State, Federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law,' " Pet. App. 39a, quoting *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 149, or would "infringe upon the right of reservation Indians to 'make their own laws and be ruled by them,' " Pet. App. 39a, quoting *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, *supra*, 447 U.S. at 156. The appellate court then examined the purposes of the 1938 Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g, the legislative history of Montana's 1975 severance tax law and the obvious effects of that law on the Crow Tribe's coal re-

sources, along with the allegations of the Tribe's Amended Complaint and the nature of Montana's legitimate interests in taxing the Tribe's coal resources. Pet. App. 43a-53a. Based on review of the legislative history of the enactment of the 30% severance tax in 1975, the court concluded that Montana "inten[ded] to appropriate most of the economic rent [attributable to the production of Crow coal]." Pet. App. 45a-46a. See also, Pet. App. 49a (Montana "appears to have attempted to appropriate a portion of the value of tribal resources that has no relationship to the services, if any, it provides.") For purposes of Montana's motion to dismiss, the truth of the Tribe's allegations concerning the severe economic impact of Montana's taxes on tribal government was accepted. Pet. App. 51a. The court held that those allegations, if sustained at trial, would be sufficient to invalidate Montana's severance tax on the ground that the tax would conflict with the purposes of the 1938 Indian Mineral Leasing Act, Pet. App. 45a, [2] and would also invalidate Montana's severance and gross proceeds taxes on the ground that they would infringe on the Tribe's right to govern itself, Pet. App. 53a.

SUMMARY OF ARGUMENT

The interlocutory decision of the court of appeals is correct, is consistent with the controlling decisions of this Court, and does not conflict with any other federal or state court decision. Further review is therefore unwarranted, particularly prior to the trial on remand.

The court of appeals correctly applied the rules governing the extent of state taxing authority over Indian commerce set forth in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136

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[2] The court found that the record was insufficient to assess whether the gross proceeds tax conflicted with the policies of the 1938 Act but held that the Tribe's allegations were sufficient to raise that possibility. Pet. App. 49a.

(1980); and *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Reversal and remand of the district court's decision is also compelled by the subsequent decision in *Merrion* v. *Jicarilla Apache Tribe*, 102 S.Ct. 894, 912-13 n. 26 (1982), which suggests that Montana's taxes might also constitute an impermissible burden on interstate commerce. These precedents require the development of a factual record to determine the nature and extent of the state, federal, and tribal interests at stake concerning the application of Montana's extraordinarily burdensome taxes to Crow coal.

ARGUMENT

1. The court of appeals was correct in rejecting the district court's conclusion that all state taxes on Indian commerce are permissible if the legal incidence of the tax falls on non-Indians or on non-Indian property unless Congress has expressly legislated a broader tax immunity. As this Court stated in response to an identical argument advanced by state officials: "That is simply not the law." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 150-51 (1980). Rather, as noted by the court of appeals (*see, supra*, at 4), the validity of state taxes turns on "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at 145. In the context of this case, the court of appeals held that such an inquiry requires that the parties be provided an opportunity to prove their contentions at trial.

Petitioner apparently does not challenge these rulings. Indeed, but for a brief footnote, Pet. 10-11 n. 5, petitioner has seemingly abandoned reliance on the district court's rationale.

2. Petitioner's primary claim is that the court of appeals' decision is inconsistent with two other subsequent decisions, *Commonwealth Edison Co.* v. *Montana*, 101 S.Ct. 2946 (1981); and *Merrion* v. *Jicarilla Apache Tribe*, 102 S.Ct. 894 (1982). There is no merit to these contentions.

Commonwealth Edison simply upheld Montana's severance tax against the claims that it was an impermissible burden on interstate commerce and that it was preempted by the 1920 Federal Mineral Lands Leasing Act and by national energy policies embodied in various statutes. The Tribe's challenges to Montana's tax are entirely different. Pet. App. 54a-55a. No claim is made in this suit that the tax contravenes the interstate portion of the Commerce Clause. The Tribe's preemption argument is predicated on Indian statutes and policies that were entirely extraneous to the issues presented in *Commonwealth Edison*. As a result, that precedent provides no guidance in this case. As stated in *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 143:

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law. Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law.

Petitioner contends that *Commonwealth Edison* forecloses any inquiry into the extent of the State's legitimate interest in taxing Indian commerce because the Court refused to test the constitutionality of a general revenue tax by the quantity or quality of governmental services provided to the taxpayer. Pet. 11-13. Once again *White Mountain Apache Tribe* v. *Bracker*, *supra*, provides a complete response. In that case, the Court looked for, but failed to find, "a responsibility or service that justifies the assertion of [state] taxes" on a non-Indian logging company and expressly held that the state's "generalized interest in raising revenue" was not sufficient to validate its tax on Indian commerce. 448 U.S. at 150. *White Mountain*, rather

than *Commonwealth Edison*, is the controlling precedent because it deals with the precise subject matter of this litigation, the validity of a state tax on Indian commerce. By contrast, *Commonwealth Edison* involved a challenge to Montana's tax predicated on the different, more general, standards of the Interstate Commerce Clause and the Fourteenth Amendment.

Aside from the special considerations applicable to preemption of state authority over Indian commerce, the 1938 Indian Mineral Leasing Act differs in at least one very significant and relevant respect from the federal mining laws at issue in *Commonwealth Edison*. While the Indian statute is silent on the issue of state taxation,[3] the 1920 federal mineral leasing statute expressly authorized imposition of state severance taxes. The Court's decision upholding Montana's tax against the challenge that it was preempted by the 1920 Federal mineral leasing statute was predicated on the existence of that provision. *See*, 101 S.Ct. at 2961-62. This essential difference between the two statutory schemes, taken by itself, vitiates petitioner's contention (Pet. 11) that *Commonwealth Edison* controls the outcome of this case.

Petitioner's reliance on *Merrion* v. *Jicarilla Apache Tribe*, *supra*, is also misplaced. That case upheld a tribal severance tax; the Court expressly declined to rule on the validity of the state's severance tax on tribal minerals. 102 S.Ct. at 909 n. 17, 912-13 n. 26.[4]

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[3] In Merrion v. Jicarilla Apache Tribe, *supra*, 102 S.Ct. at 909 n. 17, this Court left open the question of whether states have the power to tax tribally owned minerals leased under the 1938 Act.

[4] The Court cited *Commonwealth Edison*, 102 S.Ct. at 902, in describing the general nature of the Tribe's power to tax. But the similarity in the nature of tribal and state taxing powers has nothing to do with determining whether the state tax has been preempted.

There is, however, one aspect of the *Merrion* decision which does have an important bearing on this case. One of the grounds for the oil companies' challenge to the tribe's tax was that the tax constituted a multiple burden on interstate commerce because the state imposed a tax on the same activity. The Court responded by holding that the Tribe's severance tax on the production of its minerals was primary and that "any challenge asserting that tribal and State taxes create a multiple burden on interstate commerce should be directed at the State tax, which, in the absence of congressional ratification, might be invalidated under the Commerce Clause." 102 S.Ct. at 912-13 n. 26. In this respect, *Merrion* reinforces the correctness of the court of appeals' disposition because this case also involves both tribal and state taxes on the same activity. Pet. App. 36a, 50a-51a and nn. 19, 20. The question of whether the state tax constitutes an impermissible burden on interstate commerce as suggested by *Merrion* obviously cannot be resolved in the absence of a factual record.

In short, the court of appeals correctly relied on *White Mountain Apache Tribe* v. *Bracker, supra;* and *Washington Confederated Tribes of the Colville Indian Reservation, supra,* in holding that an evidentiary hearing is required to determine the nature of the state, tribal, and federal interests at stake. That holding draws further support from the discussion of the multiple taxation issue in this Court's subsequent decision in *Merrion* v. *Jicarilla Apache Tribe, supra*. Any other disposition would constitute reversible error.

3. Petitioner next contends that the court of appeals' decision conflicts with this Court's interpretations of the 1938 Indian Mineral Leasing Act. Pet. 13-17. But none of the cases cited by the petitioner stand for that proposition. *Commonwealth Edison* involved the 1920 Federal Mineral Leasing Act as amended in 1975 which, as we have seen, (*supra*, at 8) differs in at least one very significant respect from the 1938

Indian Mineral Leasing Act. As petitioner recognizes, *Merrion* v. *Jicarilla Apache Tribe*, *supra*, expressly left open the question of whether the states have power to tax production of minerals that are leased under the 1938 Act. Pet. 16. Surely there is no inconsistency between what the court of appeals said about the purposes of the 1938 Act and *Merrion's* holding (102 S.Ct. at 908-09) that the Act does not divest Indian tribes of their sovereign power to tax the mineral production of their lessees. The other decisions cited by the petitioner (Pet. 14-15) either do not involve the 1938 Indian Mineral Leasing Act[5] or do not contain anything that is at all contrary to the court of appeals' analysis.[6]

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[5] Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), upheld the validity of one state tax, and struck down another, on an off-reservation tribal ski enterprise. *See*, *infra*, at 12. Washington v. Confederated Tribes of the Colville Indian Reservation, *supra*, was concerned with the state's sales tax on cigarettes and excise tax on motor vehicles. Neither mining of the tribal mineral resources nor taxation of such minerals was at issue in either case. Although *Colville* upheld the state cigarette tax as applied to non-Indian purchasers, the basis of that holding was expressly limited to the situation in which Indian commerce was the direct product of a claimed tax exemption. The Court was careful to leave open the possibility that state taxes could be preempted or held to constitute an interference with tribal self-government or an undue burden on Indian commerce where, as here, revenues are derived from tribal resources and the taxpayers is a recipient of tribal services. 447 U.S. at 152, 153, 155-57; Pet. App. 52a-53a.

[6] Oklahoma Tax Comm'n. v. Texas Co., 336 U.S. 342 (1949), upheld the validity of "small" state taxes paid by lessees of Indian minerals which were used to pay for state services that directly benefited all mineral producers in the state. 336 U.S. at 351. The focus of the Court's opinion was the demise of the federal instrumentality doctrine; nothing was said concerning the purposes of the 1938 Act or the possible preemptive effect of that legislation. *See*, Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 470-74 and n. 13 (1976). The Indian tax cases of that era that arose in Oklahoma were distinguished in McClanahan v. Arizona Tax Comm'n., 411 U.S. 164, 171 (1973), as applicable only where Indians left the reservation and became assimilated into the general community. *See*, Oklahoma Tax Comm'n. v. United States, 319 U.S. 598, 602-03, 608-09 (1943);

Petitioner also finds fault with the Indian preemption test applied by the court of appeals that "no express congressional statement of preemptive intent is required" Pet. 14 and n. 9, Pet. App. 39a, but that standard is taken directly from *White Mountain Apache*, at *supra* 448 U.S. at 144.

4. Petitioner's final contention is that the court of appeals erred by failing to distinguish between the Crow Reservation proper and the ceded area. Pet. 17-19. But the court of appeals did no such thing. Its opinion deals with both reservation and ceded strip coal, *see, e.g.*, Pet. App. 35a, 44a n. 10, 46a n. 13, 48a, 50a n. 19, expressly recognizes that different considerations may apply to the coal mined by Westmoreland from the ceded strip, and states that "[i]nquiry in this regard can be had on remand." Pet. App. 48a-49a.

Insofar as petitioner is asserting that its taxes are applicable to Crow coal in the ceded strip as a matter of law and that the Tribe's allegations are not sufficient to raise any triable issues on that score, it is clearly mistaken. While the reservation boundary is "an important factor to weigh in determining whether state authority has exceeded the permissible limits, it is not absolute." *White Mountain Apache Tribe* v. *Bracker*, 448

F. Cohen, Handbook of Federal Indian Law, 418, 421-24 (1982 ed.). *Compare*, Warren Trading Post v. Arizona Tax Comm'n., 380 U.S. 685, 690 (1965). *See also*, Bryan v. Itasca County, 426 U.S. 373, 392 (1976) (quoting with approval the core of the dissenting opinion in Oklahoma Tax Comm'n. v. United States, *supra*.)

It is doubtful whether the non-Indian mineral producers who asserted the Indian tax immunity in Oklahoma Tax Comm'n. v. Texas Company, *supra*, even had standing to contend that the state taxes interfered with tribal self-government, constituted an undue burden on Indian commerce, or were preempted by Federal law since the lessees were not arguably within the zone of interests to be protect by those laws. *See*, Valley Forge Christian College v. Americans United for Separation of Church and State, 102 S.Ct. 752, 760 (1982); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 474 n. 13 (1976).

U.S. 136, 151 (1980). In *Central Machinery Co.* v. *Arizona Tax. Comm'n.*, 448 U.S. 160, 164-65 (1980), the fact that the taxpayer's permanent place of residence was located off the reservation was not sufficient to validate the state tax. *Compare*, 448 U.S. at 168-70 (dissenting opinion). Similarly, in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), the Court struck down a state's use tax on a tribe's personal property affixed to off-reservation, non-trust land leased to the tribe by the United States, while at the same time upholding a state income tax on the same off-reservation source.

Thus, while the reservation boundary is clearly relevant, it is obviously not controlling. In the circumstances of this case, the significance of the boundary is diminished by the following factors: the ceded strip coal is tribal trust proper y which never left tribal ownership, Pet. App. 35a (*see, Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980)); the ceded strip is immediately adjacent to the reservation; the existing Westmoreland mine on the ceded strip employs tribal members who reside on the reservation and therefore the taxpayer (Westmoreland) directly benefits from governmental services provided by the Tribe; and perhaps most importantly, the two most relevant statutes, the 1938 Indian Mineral Leasing Act and the 1977 Surface Mining Control and Reclamation Act expressly encompass all tribal minerals that are held in trust, not just those located within reservations. Pet. App. 35a, 48a n. 16, 49a n. 17, 67a. The court of appeals was therefore clearly correct in remanding the case for trial to determine the nature of the state, federal, and tribal interests that bear on the state's taxation of the Tribe's coal in the ceded strip.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

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No. 81-1852

In The

Supreme Court of the United States

October Term, 1981

STATE OF MONTANA, and RAMON DORE,
Director, Montana Department of Revenue,

Petitioners,

vs.

CROW TRIBE OF INDIANS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. The Tribe's reliance on White Mountain Apache Tribe v. Bracker is misplaced.

Respondent Crow Tribe (hereinafter "Tribe") insists that *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136 (1980), makes clear, and settles, the proposition of the Crow Tribe and of the Ninth Circuit Court of Appeals that the validity of Montana's taxes on the non-

Indian coal producer in the present case must be determined by a trial in which the court must make "a particularized inquiry into the nature of the state, federal and tribal interests at stake." *Bracker*, 448 U. S. at 149. Such a "particularized inquiry" would always be required to justify any state taxation involving Indians in any way. The Tribe alleges that the State has conceded that such a proposition is correct. (Brief in Opp. 6.) The State, of course, has made no such concession.

It has always been the State's position that *Bracker* should be limited to its facts. Unlike the federal regulations involving timber harvesting on an Indian reservation, the federal regulations applicable to the mining of coal beneficially owned by the Crow Tribe focus upon the federal trust responsibility to the tribe in the administration of coal leases, rather than upon federal involvement in the day to day operations of coal mining. *See*, Pet. App. 70a-103a. Moreover, the extensive contact of Westmoreland Resources with the State of Montana on the ceded strip distinguishes this case from the activities of Pine Top Logging Co. solely within the Fort Apache reservation in *Bracker*.

II. The application of Bracker to this case will result in important and recurring litigation.

If *Bracker* is the "complete response" in this case (Brief in Opp. 7), so that the District Court must make a "particularized inquiry" as set forth in *Bracker*, the inevitable result is confusing and endless case-by-case litigation of states' authority to tax. The states would no longer be entitled to any general revenue tax on any activity remotely involving Indians or Indian tribes. Instead,

the states would be required to enter into the impossible task of quantifying services rendered to the taxpayer.[1] It is inconceivable to the State that this Court would sanction such an inquiry which would require the federal courts to hear evidence and determine such minutia as whether a coal producer's employees who move into a coal mining area vote, or have children who attend public schools in the vicinity of the coal mine. Such inquiry would result in economic confusion passing far beyond the State of Montana.

If such "particularized inquiry" must be made with regard to the clearly identifiable Montana taxes, the same inquiry must be made for the numerous "hidden" taxes imposed by sovereigns in the commercial sphere. The courts would be required to search out and identify those taxes. The absurd result, after much litigation, is that those doing business with Indian tribes have found a "safe harbor" from all taxes imposed on them and their suppliers.

The Tribe's and the Ninth Circuit's interpretation of *Bracker*, as well as of *Merrion v. Jicarilla Apache Tribe*, 102 S. Ct. 894, 912-913, n. 26 (1982), imposes extraordinarily heavy burdens upon the State, and makes it far too easy for the immunities to be extended to those who are not entitled to them. The approach of *Bracker* requires constant judicial weighing of competing interests which yields results which are inconsistent, unpredictable, and often irrational and unfair.

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1 It is odd that this quantification is required because of the taxes' economic effect upon the Tribe, but the measure of the taxes' validity is the value of State services rendered to the taxpayer.

This Court has recently examined the issue of the states' power to tax federal contractors in *United States v. New Mexico*, 102 S. Ct. 1373 (1982). There, this Court acknowledged the long-standing and clear doctrine of the immunity of the United States from state taxation, but recognized that the immunity was a "much litigated and often confused field." *Id.* at 1380. This Court clarified the confusion surrounding federal immunity by reaffirming the use of the legal incidence test in order to avoid the "inconsistent decisions and excessively delicate distinctions" (*United States v. City of Detroit*, 355 U. S. 466, 473 (1958)) which otherwise afflicted the federal tax immunity. This Court held that states may impose their non-discriminatory taxes upon contractors providing services to the United States government. If the United States in the instant case were in the place of the Crow Tribe, then the state taxes in question unquestionably would be collectible from the non-Indian coal producers responsible for paying the taxes.

The State suggests that the legal incidence test should be applied in the much litigated[2] and confused field of Indian tax immunity, and in this case. This Court should once again begin with the presumption in tax immunity analyses that "[a]bsent Congressional action, . . . the states' power to tax can be denied only under the clearest Constitutional mandate." *Michelin Tire Corp. v. Wages*, 423 U. S. 276, 293 (1976), cited with approval in *United States v. New Mexico, supra*, 102 S. Ct. at 1384. This Court should clarify the confusion resulting from *Bracker*

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2 *See, e. g., Ramah Navaho School Board, Inc., et al. v. Bureau of Revenue, State of New Mexico, No. 80-2162.*

by holding, as it did in *United States v. New Mexico*, that it is the legal incidence of a non-discriminatory tax—and not the economic incidence—that is relevant in analyzing tax immunities. *United States v. New Mexico*, 102 S. Ct. at 1383, n. 11.

III. Bracker does not apply to the ceded strip.

The Ninth Circuit and the Tribe attempt to extend the confusion requirements of *Bracker* beyond the Crow reservation boundary to the ceded strip. Although the Tribe raises the boundary as a barrier which the State may cross only with the most compelling justification, even when taxing the State's non-Indian citizens, the Tribe attempts to efface the boundary for purposes of extending Indian tax exemptions to non-Indians doing business off the Indian reservation. The Tribe has thus ignored the immutable fact: boundaries do define the reservation,[3] just as the exterior boundaries of the State of Montana define its land and jurisdiction.

CONCLUSION

The questions posed in this case involving non-Indians doing business on Indian reservations, or doing business with Indian tribes off of Indian reservations, are not solved

3 In other contexts, the exact location of reservation boundaries has been the subject of hot dispute in which no one suggested that the boundary is to be ignored. *See, e. g., Ash Sheep Company v. United States*, 252 U. S. 159 (1920); *Seymour v. Superintendent*, 368 U. S. 351 (1962); *Mattz v. Arnett*, 412 U. S. 481 (1973); *DeCoteau v. District Court*, 420 U. S. 425 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584 (1977).

by *Bracker*. Those questions can only be answered by this Court granting certiorari and reversing the Ninth Circuit Court of Appeals.

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No. 81-1852

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF MONTANA, AND RAMON DORE, DIRECTOR, MONTANA DEPARTMENT OF REVENUE, PETITIONERS

v.

CROW TRIBE OF INDIANS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals correctly remanded this case to the district court for a determination of the validity of Montana's severance tax and gross proceeds tax as applied to the production of coal owned by the Crow Tribe of Montana.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation of June 14, 1982 to the Solicitor General to express the views of the United States.

STATEMENT

1. The Reservation for the Crow Tribe, a federally-recognized Indian Tribe, was first established by the Treaty of Fort Laramie of 1851, 11 Stat. 749 (Pet. App. 131a). The Reservation later was reduced in size by a second treaty, the Treaty of Fort Laramie of 1868, 15 Stat. 649 (Pet. App. 135a), and by subsequent statutes. Act of Apr. 11, 1882, ch. 74, 22 Stat. 42; Act of July 10, 1882, ch. 284, 22 Stat. 157; Indian Appropriations Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1039; Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352 (Pet. App. 142a). See Pet. App. 12a, 13a.

In the last of these statutes, the Tribe ceded an area of approximately 1,137,500 acres, now called the "ceded strip" or "ceded area," to the United States (Pet. App.

13a). Under the 1904 Act, the government was required to hold the land in trust for the Tribe for entry by non-Indians under various public land laws, and the Tribe was to receive the proceeds from the disposition of the land as they were realized. See 33 Stat. 357; *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 163-166 (1920). The land was largely settled by non-Indians, but for a significant portion of the land, the mineral rights were not disposed of and continued to be held in trust by the United States for the benefit of the Tribe. Pet. App. 35a; *Cady* v. *Morton*, 527 F.2d 786, 789 (9th Cir. 1975). The minerals in question consist largely of coal.

Coal also underlies the Reservation proper. Although allotments were issued on the Reservation under the Crow Allotment Act of June 4, 1920, ch. 224, 41 Stat. 751, as amended, Act of May 26, 1926, ch. 403, 44 Stat. 658 (Pet. App. 123a), the title to the coal on the Reservation was to remain in the Tribe for a period of 50 years, after which it was to vest in the allottees unless Congress directed otherwise (Pet. App. 125a). In a subsequent statute, Congress vested title to this coal in the Tribe permanently. Act of May 17, 1968, Pub. L. No. 90-308, 82 Stat. 123 (Pet. App. 129a). Compare *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649 (1976).

2. The Tribe's coal is largely undeveloped. Beginning in 1967, the Tribe and the Department of the Interior encouraged prospecting both on the Reservation itself and in the ceded area. At present, there are only two leases with the Tribe under which coal is actively being mined. Both cover coal in the ceded area and both are with Westmoreland Resources, Inc. (Pet. App. 35a). These leases were entered into in 1972 and were amended in 1974 to increase the royalty. The leases run for 10 years and as long thereafter as coal is mined in paying quantities, although they provide for renegotiation of the royalty every 10 years (see Pet. App. 13a-14a, 46a n.13).

In 1975, Montana enacted a severance tax on the production of coal and a gross proceeds tax on the sale of

coal. Mont. Code Ann. §§ 15-35-101 through 15-35-111 and 15-23-701 through 15-23-704 (1981) (Pet. App. 35a). The rate of the severance tax varies from 3 to 30% of the value of the coal, depending upon its quality (Pet. App. 36a). See *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 613 (1981). The tribally owned coal mined by Westmoreland has been taxed at the maximum rate of 30%. At the time of the court of appeals' opinion, Westmoreland had paid $27 million in severance taxes and $3 million in gross proceeds taxes to the State, as compared with approximately $8 million in royalties paid to the Tribe under the leases (Pet. App. 35a-36a).

In 1980, the Tribe also entered into a lease with Shell Oil Co. for the development of tribally owned coal within the Reservation. Approval of this lease is now pending before the Department of the Interior. See Crow Tribe Br. in Opp. 2. We have been informed that the Department has raised some objections to the lease on matters having no bearing on the instant suit.

In 1976, the Tribe enacted a tax code providing for a severance tax at the rate of 25% to be imposed on the production of all tribally owned coal. The Secretary approved the tax as applied to mining on the Reservation, but he disapproved the tax as applied to mining in the ceded area because the Tribe's constitution disclaimed taxing jurisdiction outside the Reservation proper. The Tribe has since ratified an amendment to its constitution that would enable the Tribe to tax the extraction of tribally owned minerals in the ceded area. This amendment is now pending before the Secretary for review (Pet. App. 36a, 50a n.19).

3. This action was brought by the Tribe in July 1978 seeking declaratory and injunctive relief against the application of Montana's severance and gross proceeds taxes to the production of any coal owned by the Tribe. The Tribe argued, *inter alia*, that the State taxes conflicted with the Indian Mineral Leasing Act of 1938, 25 U.S.C. 396a *et seq.*, interfered with the Tribe's right of self-government including its ability to impose its own severance tax, and deprived the Tribe of its right to make the

fullest use and realize the fullest benefit of its own property (Pet. App. 8a-9a).

On April 3, 1979, the district court granted the State's motion to dismiss the complaint for failure to state a claim (Pet. App. 12a-33a). The court held that the State had the authority to tax coal mining activities both on the Reservation and in the ceded area because the taxes are imposed on the lessee, not directly upon the Tribe or the Tribe's property (Pet. App. 19a-22a, 30a). The court also rejected the Tribe's claim that imposition of the State taxes interfered with tribal self-government because they reduced the amount of money the tribe could realize from coal mining activities and adversely affected its ability to develop the coal at the rate it chose. In the district court's view, those asserted economic effects were "remote" (*id.* at 25a).

The district court also rejected the argument that the State taxes were preempted by federal law, relying principally on the fact that the Indian Mineral Leasing Act of 1938 and other statutes governing the leasing of the Tribe's coal were silent on the subject of state taxation (Pet. App. 27a). The court also stressed that the Tribe had not yet effectively extended its own severance tax to the ceded area, where the only active mining was occurring, and that as a result there was not yet any conflict between the state and tribal taxes (Pet. App. 27a-28a).

4. The court of appeals, in an opinion dated July 13, 1981, reversed the district court's dismissal of the complaint and remanded for further proceedings (Pet. App. 34a-53a). In so doing, the court expressly relied upon the analysis in this Court's decision in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), which was handed down after the district court's decision in this case.

The court of appeals observed that, under *White Mountain Apache*, it is not necessary that the federal legislation expressly preempt state legislation in order for the state tax to be invalid, as the district court appeared to believe; it is sufficient that the state tax conflicts with

the purpose or operation of the federal statutes and implementing regulations and policies. Pet. App. 39a; see 448 U.S. at 150-151. On the other hand, the court observed, legitimate interests of the State must be considered and the ultimate result, where the conduct of non-Indians on a Reservation is involved, depends on a "particularized inquiry into the nature of the state, federal, and tribal interests at stake" (*ibid.*, quoting 448 U.S. at 145). Similarly, the court observed that possible interference with tribal self-government may stand as an independent barrier to state legislation (*id.* at 39a-40a). The court found that the allegations in the Tribe's complaint were sufficient to state a claim that the State's taxes were invalid under the *White Mountain Apache* test.

a. First, the court found that the allegations in the complaint, if not controverted, were sufficient to show that the Montana taxes would "directly and substantially thwart the policies underlying the Mineral Leasing Act of 1938" (Pet. App. 43a). The court identified three purposes of the 1938 Act: (1) to achieve uniformity in the law governing mineral leases on Indian lands, (2) to give tribal governments control over decisions to lease their lands, subject to approval by the Secretary of the Interior, and (3) to encourage tribal economic development (Pet. App. 43a-45a). The court found that the magnitude of the State's severance tax could prevent the Tribe from receiving a large portion of the economic benefits of the mining of its own coal, thereby impeding the statutory goal of fostering economic development. The court noted in this regard that the Montana Legislature had determined that strip-mined coal " 'is in sufficient demand that at least one-third of the price it commands at the mine may go to the economic rents of royalties and production taxes' " and that the State was attempting to obtain for itself 30 percent of that price (Pet. App. 45a-46a).

The court acknowledged that some economic impact on the Tribe could be justified if the State's interests in

imposing the tax on tribally owned coal are legitimate. It noted, however, that the State's purposes in imposing the tax included the intent of sharing in the profits of mining the coal by preserving the resource or its value for future generations of the residents of the State (Pet. App. 47a). The court concluded that "[w]hile the state may have an interest in perpetuating the value of mineral wealth subject to its general civil jurisdiction, it has no such legitimate interest in appropriating Indian mineral wealth" (*ibid.*). The court also found that the State intended its tax to be a regulatory device to " 'discourage resource waste,' " which, the court held, "conflicts with the 1938 Act's purpose of allowing tribes to control the development of their mineral resources" (*ibid.*).

The court also stressed, however, that the State had asserted other, legitimate interests that if substantiated at trial could affect the outcome of the case. These interests included the need to provide services to "energy boomtowns" that sometimes are created through large-scale strip mining in rural areas, as well as mitigating possible effects on the State's environment. The court found that "[a] tax carefully tailored to effectuate the state's legitimate interests might survive" (*id.* at 48a). Accordingly, the court remanded the case for further consideration of both the Tribe's and the State's allegations (*id.* at 48a-49a). As the same time, the court recognized that the ceded area has been severed from the Reservation proper and that, as a result, "the balance of responsibilities between state and tribal governments may be altered to some degree" in that area. This, the court reasoned, likewise would be an appropriate subject for inquiry on remand (Pet. App. 48a-49a).

b. With respect to the second prong of the *White Mountain Apache* test, the Tribe had argued that the state taxes infringed on the Tribe's right to enact its own severance tax and with the Tribe's right to negotiate and renegotiate royalties, thereby restricting its ability to generate revenues for essential tribal programs (Pet.

App. 50a). For purpose of considering this contention, the court of appeals accepted as true the allegations in the Tribe's complaint that the economic impact of the State's taxes on tribal government would be "severe" (Pet. App. 51a).

The court observed that this case is not like *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), where the revenue generated by the sale of cigarettes that the State sought to tax was primarily attributable to non-Indians' entering onto the Reservation to purchase cigarettes, not to activities on the Reservation in which the Tribes have a significant interest (Pet. App. 52, citing 447 U.S. at 155). Here, in contrast, the Tribe's revenue is derived from the Tribe's mineral resources (Pet. App. 52a). Particularly noticing the fact that the State intended its severance tax to establish a fund to preserve the value of the coal for future generations of Montanans generally, the court found the State's interest in raising revenue to be weak in comparison with the Tribe's right "to the bounty from its own land" (Pet. App. 53a). Accordingly, this aspect of the case also was remanded for further proceedings, in which the Tribe would be given an opportunity to show that the State's taxes substantially affect its ability to govern or to regulate the development of tribal resources, and that the balance of state and tribal interests renders the State's asserted taxing authority unreasonable (*ibid.*).

DISCUSSION

The court of appeals did not hold the Montana severance or gross receipts tax invalid as applied to the mining of coal owned by the Crow Tribe. It merely reversed the district court's order granting the State's motion to dismiss and remanded for further proceedings on the validity of the State's taxes as applied to tribally owned coal in light of this Court's intervening decision in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980). In so doing, the court correctly identified the relevant

factors under *White Mountain Apache*, while recognizing that different considerations might obtain with respect to tribally owned coal situated in the ceded area outside the Reservation boundaries. The court of appeals' decision puts the State in precisely the situation in which it would have been if the district court had denied the State's motion to dismiss the complaint in the first instance and set the case for trial, an order that plainly is interlocutory in nature. There is no reason why the Court should depart from its usual practice and grant review at this interlocutory stage.

Review is especially unwarranted here in view of the fact that the Court only recently reexamined the issue of the validity of state taxes that affect Indian interests and reaffirmed the approach announced in *White Mountain Apache* and followed by the Ninth Circuit in this case. See *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue of New Mexico*, No. 80-2162 (July 2, 1982), slip op. 4-7, 13-14. Furthermore, because *White Mountain Apache* and *Ramah Navajo* require a "particularized inquiry" into the respective interests of the State, the Federal Government, and the Tribe, it would be premature to grant review at this time because the courts below have not yet developed a record or made factual findings on which such a particularized inquiry would rest. If, after examining the relative interests at stake with the benefit of the decisions in *White Mountain Apache* and *Ramah Navajo*, the courts below ultimately invalidate one or both of the Montana taxes, in whole or in part, as applied to some or all tribally owned coal, there will be time enough for this Court to intervene. In the meantime, the State continues to receive tax payments from Westmoreland and suffers no irreparable injury.

1. The State first argues (Pet. 10-13) that the decision below remanding the case to the district court for a determination whether the taxes are related to the legitimate interests of the State in connection with the mining activities and their resulting impact on State serv-

ices and the environment (Pet. App. 48a) conflicts with this Court's decision in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981). In the State's view (Pet. 12), *Commonwealth Edison* forbids courts from inquiring into whether there is a reasonable relationship between the imposition of a tax and the services rendered by the taxing authority. Montana's reliance on *Commonwealth Edison* is wholly misplaced.

The issue involved in the portion of the *Commonwealth Edison* opinion upon which the State relies was whether the Montana severance tax was invalid under the Interstate Commerce Clause of the Constitution. 453 U.S. at 617-629. There was no issue presented concerning whether the application of the severance tax specifically to Indian-owned coal conflicted with federal statutes or tribal self-government. In analyzing the validity of the Montana severance tax under the Interstate Commerce Clause, the Court considered, *inter alia*, the fourth prong of the test announced in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977), which requires that a State tax on interstate commerce be fairly related to the services provided by the state. The Court made clear that the question under this prong of the *Complete Auto* test is whether the state tax is properly measured in proportion to the state's contact with the activity, not whether the amount of the tax is equal to the value of the services furnished by the state. 453 U.S. at 625-629.

The decision in *Commonwealth Edison* has no relevance to this case, which does not involve a challenge under the Interstate Commerce Clause and which *does* involve the respective interests of the State and an Indian Tribe. In such cases, this Court has required a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 145 (1980). In its reply brief (at 2-5), the State argues that *White Mountain Apache* should be confined to its facts and that

such an inquiry should not be required in this case or in cases involving state taxes affecting Indian interests generally. However, since the date of the Ninth Circuit's decision in this case and also since the State filed its certiorari petition and reply brief, this Court has reaffirmed the *White Mountain Apache* approach and specifically rejected the suggestion that it abandon the need for a case-by-case analysis of the State's interest as well as those of the Tribe and Federal Government. See *Ramah Navajo*, *supra*, slip op. 4-7, 13-14. Instead, the Court reiterated the relevant test (*id.* at 5):

> The State's interest in exercising its regulatory authority over the activity in question must be examined and given appropriate weight. Pre-emption analysis in this area is not controlled by "mechanical or absolute conceptions of state or tribal sovereignty;" it requires a particularized examination of the relevant state, federal and tribal interests.

Moreover, in invalidating the tax at issue in *Ramah Navajo*, the Court stressed the lack of justification for the State to impose it (*id.* at 11):

> Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education—a scheme which has "left the State with no duties or responsibilities." *Warren Trading Post Co.* v. *Arizona Tax Comm'n.*, 380 U.S. [685, 691 (1965)]. Nor has the State asserted any specific, legitimate regulatory interest to justify the imposition of its gross receipts tax.

Conversely, the Court stated (*id.* at 11 n.7):

> This case would be different if the State were actively seeking tax revenues for the purpose of constructing, or assisting in the effort to provide, adequate educational facilities for Ramah Navajo children.

In light of *White Mountain Apache* and *Ramah Navajo*, the court of appeals plainly did not err in requiring an inquiry on remand into the relative interests of the State, the Federal Government, and the Tribe with respect to the specific mining activities being taxed.[1]

2. The State argues (Pet. App. 14-15) that state taxes affecting Indian interests are valid absent an express congressional statement to the contrary and that its severance and gross-receipts taxes therefore are valid because the 1938 Mineral Leasing Act does not expressly bar state taxes. As this Court stated in *White Mountain Apache*, however, "[t]hat is simply not the law." 448 U.S. at 151. The Court reaffirmed this principle in *Ramah Navajo* (slip op. 10), and explained (slip op. 5-6):

> The question whether federal law, which reflects the related federal and tribal interests, pre-empts the State's exercise of its regulatory authority is not controlled by standards of pre-emption developed in other areas. [*White Mountain Apache, supra*] at 143-144. Instead, the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this in-

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[1] The State's reliance (Pet. 13) on *Merrion* v. *Jicarilla Apache Tribe*, No. 80-11 (Jan. 25, 1982), slip op. 6, is misplaced for the same reason that *Commonwealth Edison* has no relevance here. In *Merrion*, the Court, in holding that Indian tribes have inherent sovereign power to impose a severance tax, observed that mining companies avail themselves of the substantial privilege of mining on the reservation and benefit from the advantages of a civilized society afforded by the tribal government. This recognition of a tribe's power to tax the mining of coal reserved for its own benefit, especially within its own borders, obviously does not support the State's authority to impose a severance tax on the same activity at the rate of 30%. Indeed, the Court elsewhere appeared to conclude that the tribe had a superior interest in imposing a severance tax, suggesting that, if anything, the state's tax would have to fall as a multiple burden on interstate commerce in the absence of congressional approval (*id.* at 27 n.26).

quiry. See *id.*, at 143 and n.10. Relevant federal statutes and treaties must be examined in light of "the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Id.*, at 144-145. As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity. *Id.*, at 143-144, 150-151.

It is significant in this regard that the leasing of Indian tribal lands for mining purposes is subject to extensive regulation by the Secretary (see 25 C.F.R. Part 171; cf. *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 373 (1968)), just as the Secretary had extensively regulated the timber operations involved in *White Mountain Apache*, 448 U.S. at 145-148, and the school construction involved in *Ramah Navajo*, slip op. 7-10. Moreover, as the court of appeals observed (Pet. App. 44a-45a), among Congress' purposes in enacting the 1938 Act were to vest greater control in Indian tribes over the leasing of their lands for mining purposes, to encourage tribal economic development, and to provide for a greater return from leasing operations. See, *e.g.*, S. Rep. No. 985, 75th Cong., 1st Sess. (1937); H.R. Rep. No. 1872, 75th Cong., 2d Sess. (1938).[2]

It is entirely possible that imposition of a substantial severance or other tax on mining activities could significantly retard the development of the Tribe's resources, thereby frustrating the statutory purpose of vesting control over those resources in the Tribe, subject to approval by the Secretary. In addition, a substantial state sever-

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[2] In this respect, the special Indian leasing act differs from the Mineral Lands Leasing Act of 1920, ch. 85, 41 Stat. 437, 30 U.S.C. 181 *et seq.*, governing the leasing of federal lands. As this Court observed in *Commonwealth Edison*, the legislative history of the 1920 Act and the amendments thereto manifest a congressional intent only to secure a " 'fair return to the public,' " not to maximize the federal government's return from leasing operations. See 453 U.S. at 632.

ance or other tax might leave little revenue remaining to be realized by the Tribe from mining activities and devoted to vital governmental and tribal programs. Not only might such a result be inconsistent with the purposes of the 1938 Act to foster tribal economic development and provide for a greater return to Indian tribes (compare *Ramah Navajo, supra*, slip op. 9-10 & n.5, 12; *White Mountain Apache, supra*, 448 U.S. at 149), it might also significantly interfere with the right of tribal self-government by impairing the Tribe's ability "to raise revenues for its essential services" (*Merrion* v. *Jicarilla Apache Tribe*, No. 80-11 (Jan. 25, 1982), slip op. 5). See also *id.* at 5-7; *id.* at 8, quoting S. Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879); *id.* at 9, 28; *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152, 156-157 (1980).[3]

The court of appeals recognized, of course, that the State does assert other legitimate interests in this case that might, if substantiated, have a bearing on the weighing of the respective state, federal, and tribal interests. The Montana severance tax is "imposed for the general support of the government" (*Commonwealth Edison, supra*, 453 U.S. at 621, quoting 615 P.2d 847, 856 (1980)), and is therefore a "general revenue tax" (453 U.S. at 621).[4] Nevertheless, the court of appeals observed (Pet. App. 48a) that the possible effect of mining, even of Indian coal, on the environment and on the de-

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[3] As the court of appeals recognized (Pet. App. 52a), this case differs considerably from *Colville*, which involved taxes imposed on the sale of cigarettes by Indians to non-Indians. There, it was "painfully apparent that the value marketed by the smokeshops to persons coming from outside [was] not generated on the reservations by activities in which the Tribes [had] a significant interest" and that the tribes were actually seeking to do little more than market an exemption from state taxation. 447 U.S. at 155. Here, in contrast, the State seeks to tax the depletion of the Tribe's vital mineral resources, an activity in which the Tribe plainly has a "significant interest."

[4] Compare *Ramah Navajo, supra*, slip op. 12; *White Mountain Apache, supra*, 448 U.S. at 150.

mand for state services—consequences that could require substantial expenditures by the State—might support application of state taxes tailored to these concerns. This argument is not without force. See *Ramah Navajo*, *supra*, slip op. 11 & n.7; *White Mountain Apache*, *supra*, 448 U.S. at 150; *Colville*, *supra*, 447 U.S. at 163-164. At the present time, however, without the benefit of the requisite "particularized inquiry" by the courts below into the competing interests, we are unable to ascertain the strength of the State's concerns or the extent to which they are offset by, or may be apportioned against, countervailing federal and tribal concerns.[6]

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[6] As the State acknowledges (Pet. 14), the 1938 Indian leasing act does not expressly authorize state taxation of production under leases issued pursuant to that Act. The State attempts to argue (*id.* at 16) that such taxation is nevertheless permitted by that Act because, it asserts, the 1938 Act did not repeal the Act of May 29, 1924, ch. 210, 43 Stat. 244, 25 U.S.C. 398, which did authorize state taxation of mineral production on treaty reservations. There are a number of difficulties with this argument, especially in the context of this case:

First, the question whether the express authorization of state taxation in the 1924 Act and the similar provision in the 1927 Act governing leasing of Executive Order reservations (Act of March 3, 1927, ch. 299, Section 3, 44 Stat. 1347, 25 U.S.C. 398c) apply to leases issued under the 1938 Act has not yet been resolved. This question was expressly left open by this Court in *Merrion* v. *Jicarilla Apache Tribe*, slip op. 20 n.17, as it had been by the Tenth Circuit in that case, 617 F.2d 537, 547-548 n.5 (1980). The question likewise was not decided by the Ninth Circuit in this case, although that court expressed the tentative view that the pertinent provision of the 1924 Act "probably" had been repealed, not preserved, as the State argues (Pet. App. 44a n.10). We note in this regard that Section 7 of the 1938 Act, 52 Stat. 348, repealed all inconsistent provisions of prior acts, and Felix Cohen's *Handbook of Federal Indian Law* (1942), states (at 87) that the 1938 Act "superseded" prior leasing legislation.

Second, there is substantial doubt whether the 1924 Act would apply to the present leases in any event, for it does not appear that the 1924 Act reached the Crow's coal. Leasing on the Crow Reservation was the subject of a special, previously enacted statutory provision which did not authorize state taxation of the output of mines. Section 6 of the Crow Allotment Act of 1920, ch. 224, 41

3. Finally, the State argues (Pet. 17-19) that the court of appeals failed to distinguish between the appli-

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Stat. 753, as amended by the Act of May 26, 1926, ch. 403, 44 Stat. 659. It seems likely that this special statute would have continued to govern leasing on the Crow Reservation even after the 1924 Act was passed. The conclusion that mining on the Crow Reservation was not covered by the general leasing legislation of 1924 is supported by the fact that, until 1959, the Crow Reservation was *expressly* excluded from the general Indian leasing act of 1938, which superseded the 1924 Act (see 25 U.S.C. 396f; Pet. App. 42a-43a n.6), presumably because of the special provision applicable to that Reservation in the Crow Allotment Act of 1920. The ceded area would not in any event have been subject to the 1924 Act, including its express authorization of state taxation, because that Act applied only to unalloted lands "on Indian reservations." 25 U.S.C. 398. The 1938 Act, in contrast, applies to lands "within any Indian reservation" as well as to other "lands owned by any tribe * * * under Federal jurisdiction." 25 U.S.C. 396a.

Third, the State cites (Pet. 14) this Court's decision in *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342 (1949), for the proposition that the 1938 Act does not immunize non-Indian lessees from state taxes. In that case, however, the Court simply abandoned the doctrine of intergovernmental immunity— under which a tax exemption was recognized as a matter of constitutional law—as a basis for exempting the operations of a lessee of Indian allotments from the imposition of taxes on its mining operations. The intergovernmental immunity doctrine is distinct from the basis of immunity asserted in this case: that the particular tax in suit, imposed at a rate of 30%, is preempted by federal law or impermissibly interferes with tribal self-government. See *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 474 n.13 (1976). There was no discussion in *Oklahoma Tax Commission* of any possible conflict between the purposes of the 1938 Act and the Oklahoma taxes there in issue.

Finally, even if the 1938 Act could be thought to tolerate state severance taxes at the modest rate that was common at the time that Act was passed (see, *e.g.*, *Oklahoma Tax Commission* v. *Texas Co.*, *supra*, 336 U.S. at 345-347, 349-351), it would not necessarily follow that a state is free to impose a severance tax on the mining of Indian coal without limitation in amount, especially if it is shown to interfere substantially with the administration of the Indian leasing program and deprive a tribe of a substantial portion of the revenue it would need for vital tribal programs.

These issues concerning the interaction of the 1938 Act, its predecessors, and the special legislation applicable to the Crow Reservation—and the implications of that interaction for the validity

cation of the state taxes to the mining of tribally owned coal on the Reservation proper and the mining of such coal in the ceded strip. This is simply incorrect. The court of appeals expressly recognized that "the balance of responsibilities between state and tribal governments may be altered to some degree" with respect to the ceded strip (Pet. App. 48a). The court explained that "the policy of protecting Indian sovereignty involves a 'significant geographical component * * * which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits'" (*ibid.*, quoting *White Mountain Apache*, *supra*, 448 U.S. at 151). The court left this matter, too, for further exploration on remand (Pet. App. 49a). It therefore would be premature for this Court to consider the appropriate balance among state, federal, and tribal interests in the ceded strip until the record is further developed on this issue.

We note in this regard, however, that several factors suggest that the mere fact that the event sought to be taxed or regulated by the State occurs outside the Reservation boundaries should not necessarily be given controlling weight in this case, whatever the significance of the Reservation boundary in other settings. This is not the ordinary case in which a state might seek to apply its laws, including tax laws, to the activities or property of individual Indians while they are off the Reservation and assimilated, either temporarily or permanently, into the non-Indian community. See *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 171 (1973). The ceded strip was part of the original Crow Reservation and even now is directly adjacent to it, and the land and minerals in the strip have continued to be held in trust by the United States for the benefit of the

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of state severance taxes in general, and the 30% tax imposed by Montana in particular—were not resolved by the court of appeals. They may appropriately be considered by the district court on remand.

Tribe until sold, in which event the proceeds likewise are to be used for the Tribe's benefit. *Ash Sheep Co.* v. *United States*, 252 U.S. 159 (1920). In many instances, when homestead patents were issued on the ceded strip, the mineral estate was reserved and thus continues to be held in trust for the Tribe. In a significant sense, then, the tribally owned coal in the ceded area has remained in "reservation" status, even though situated outside the boundaries of the Reservation as defined for more traditional purposes, such as civil and criminal jurisdiction over activities occurring on the surface. Moreover, the 1938 Indian leasing act applies to tribally owned coal both on the Reservation proper and in the ceded area, and the Tribe's interest in generating revenue for vital tribal programs and conserving its depletable resources or the value of such resources for future generations of tribal members applies to its coal in both locations.

It is true that in *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), the Court upheld the application of a state income tax to revenue generated by the operation of a ski lodge on land deemed to be held in trust. But the income being taxed there was not, as here, directly tied to the depletion of the value of the trust land itself. *Squire* v. *Capoeman*, 351 U.S. 1, 10 (1956). It is significant in this regard that although the Court in *Mescalero Apache* sustained the income tax as applied to revenue derived from the ski resort, it invalidated the application of the state's compensating use tax as applied to materials used in the construction of ski lifts on the land. The Court held that permanent improvements on the land are so intimately bound up with the use of the land itself that, like the land, the improvements must be exempt from taxation as well. 411 U.S. at 158-159. In this case, a tax on the extraction of Indian coal likewise is effectively a tax on the use of the trust property itself.

In addition, this Court has recognized that a severance tax is much like a real property tax. *Commonwealth Edison*, *supra*, 453 U.S. at 624. There would seem to be little doubt that a state could not impose a real property tax on property held in trust by the United States for

Indians, even if outside the boundaries of an Indian reservation. Cf. *Mescalero Apache Tribe* v. *Jones*, *supra*. This factor cautions against recognizing a power in the State here to impose a tax at the full rate of 30% on the value of that property as it is severed from the earth. *Id.* at 158.[6]

We do not mean to suggest that the mining of tribally owned coal in the ceded area is wholly beyond the reach of the State's taxing power. To the contrary, it is our tentative view that, at a minimum, a state tax that is tailored in relation to activities of state concern within that area, and at the same time sensitive to countervailing tribal concerns, would withstand scrutiny. For the reasons just given, however, we do believe that in the particular circumstances of this case, the court of appeals correctly reversed the district court's dismissal of the complaint for failure even to state a claim and remanded for further proceedings to consider the validity of the application of the state taxes in full force to tribally owned coal in the ceded strip, along with the application of the taxes to coal on the Reservation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] Compare *Oklahoma Tax Commission* v. *Texas Co.*, discussed at note 5, *supra*.

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